DEMOCRACY AND HUMAN RIGHTS IN TANZANIA MAINLAND

The Bill of Rights in the Context of Constitutional Developments and the History of Institutions of Governance

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DEDICATION

To my beloved children Matongo Andrew, Sizya Redempta, Kanti Kenneth and Kab'alula Beatus; and to my dear wife Venosa

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M.K.B. Wambali.

Royal Leamington Spa and Dar Es Salaam.

March, 1996 and August, 1997.

Declaration

I MICHAEL KAJELA BEATUS WAMBALI do hereby declare that this thesis is my own work and has not been submitted or is not currently submitted for a degree in any other University.

Signature:

Michael Kajela Beatus Wambali.

Summary

This thesis is an examination of human rights and constitutional development in Tanzania Mainland. The colonial and post-colonial history is used to analyse the development of human rights struggles, as well as institutions such as the Bill of Rights in the recent development of multi-party democracy.

The thesis intends to establish that in spite of global factors such as pressure for democratisation from international institutions, the achievement of the Bill of Rights in Tanzania Mainland is part of a wider rights struggle of the people of Tanzania. The effective legal and political implementation of specific rights such as the right to vote, freedom of association and assembly reflect the state of that struggle.

The thesis further seeks to establish that while the government sponsored the enactment of the Bill of Rights in 1984 and the re-introduction of multi-partism in 1992, it has always preferred to exercise extreme control over the enjoyment of political rights. This has often involved curtailing the establishment and free operation of institutions of popular democracy.

The thesis goes on to suggest that unless a democratic culture and civil society are restored in the country, the success of the rights struggles of the people will be far-fetched.

Together with the above it is argued that the struggle for rights could be enhanced by working from what is provided as legal rights, all interested parties pushing for the expansion of the human rights field. This can only be attained if the majority of Tanzanians are made aware of the existence of such rights through legal literacy programs.

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Attorney General & Two Others v. Aman Walid Kabourou, **Tanzania Court of Appeal, Civil Appeals Nos. 32 & 42 of 1994 (unreported)**

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Butambala. v. The Attorney General, **[1992] LRC (Const.) 495.**

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C. R. Ramsan v. Lloyed Barker and the Attorney General, **(1983) 9 CLB 1211.**

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African Chiefs Ordinance (Repeal) Act 1963, Cap 517

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Civil Service Act 1962, Cap 509

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Civil Service (Negotiating Machinery) Act 1962, Cap 484

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Committee for the Enforcement of the Leadership Code Act 1973, Act No.6 of 1973

Companies Ordinance, Cap 212

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Deportation Ordinance (Amendment) Act 1991, Act No.3 of 1991

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Economic and Organised Crime Control Act 1984, Act No.13 of 1984

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Economic Sabotage (Special Provisions) (Amendment) Act 1983, Act No.10 of 1983

Eighth Constitutional Amendment Act 1992, Act No.4 of 1992

Elections Act 1985, Act No.1 of 1985

Elections (Amendment) Act 1992, Act No.6 of 1992

Eleventh Constitutional Amendment Act 1994, Act No.34 of 1994

Emergency Powers Act 1986, Act No.1 of 1986

Expulsion of Undesirables Ordinance 1930, Cap 39

Fifth Constitutional Amendment Act 1984, Act No.15 of 1984

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Hut and Poll Tax Ordinance 1922, No.25 of 1922

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Judicial Service Act 1962, Cap 508

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Magistrates' Courts Act 1963, Cap 537

Magistrates' Courts Act 1984, Act No.2 of 1984

Master and Native Servants Ordinance, No.32 of 1923

National Executive Committee (Powers and Privileges) Act 1965 (Act No.49 of 1965), Cap 599

National Union of Tanganyika Workers (Establishment) Act 1964, Act No.18 of 1964, Cap 555

Native Authority Ordinance 1926, Cap 72

Newspaper Ordinance 1928, Cap 229

Newspaper Ordinance (Amendment) Act 1968, Act No.23 of 1968

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Emergency Powers Order in Council 1939-61, originally promulgated in Kenya as GN No.1102 of 1952 and applied to the whole of East Africa.

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Foreign Jurisdiction Act 1890

Habeas Corpus Act, 1679, 31 Car.III C.2 s.2

Habeas Corpus Act, 1816, 56 Geo.III C.100 s.2

Petition of Right Act, 1627, 3 Car. C 1 s.1

Magna Carta 1214-5.

Mandated and Trust Territories Act 1947, 11 & 12 Geo. 6 c.8

Tanganyika (Constitution) Order in Council 1961, S.I 1961 No.2274

Tanganyika Independence Act 1961, 10 Eliz.2

Tanganyika (Legislative Council) Order in Council 1926, SR & O.1926 No.991

Tanganyika Order in Council 1920, S.I 1920 No. 1583

Tanganyika Order in Council 1959

List Of Abbreviations

A: Law Report And Statutory Instruments

AIR	All India Reports
AC	Appeal Cases (UK)
Cap.	Chapter of the Revised Laws (Tanzania)
EA	Eastern Africa Law Reports
EA & R	East Africa and Rhodesia
EHRR	European Human Rights Reports
GN	Government Notice
HCD	High Court Digest (Tanzania)
LRC	Commonwealth Law Reports
LRT	Law Reports of Tanzania
PLD	All Pakistan Law Decisions
QB	Queen's Bench Law Reports
RLT	Revised Laws of Tanganyika/Tanzania
SC	Supreme Court Reports (India)
SROSI	Statutory Rules & Orders and Statutory Instruments (UK)
TLR	Tanzania Law Reports

B: Others

ABT	Anglo-Belgian Treaty
AMNUT	All Muslim National Union of Tanganyika
ANC	African National Congress (Tanganyika)

ASP	Afro Shirazi Party
BAKWATA	*Baraza Kuu la Waislamu Tanzania* (Tanzania Supreme Muslim Council)
BALUKTA	*Baraza la Uendelezaji Kurani Tanzania* (Tanzania Council For Quranic Studies)
BOS	Bureau of Statistics
BTS	British Treaty Series
CBB	Commonwealth of Britain Bill
CCM	*Chama Cha Mapinduzi* (Revolutionary Party)
CHADEMA	*Chama Cha Demokrasia na Maendeleo* (Party For Democracy and Development)
CHAKIWATA	*Chama Cha Kitaalamu Cha Waalimu Tanzania* (Teachers Professional Association of Tanzania)
CHR	Commission on Human Rights
CHRG	Centre For Human Rights Geneva
CO	Colonial Office
CPP	Convention People's Party (Ghana)
CS	Commonwealth Secretariat
CUF	Civic United Front
CUN	Charter of the United Nations
DANIDA	Danish International Development Agency
DN	Daily News
DP	Democratic Party
ECOSOC	Economic and Social Council (UN)
EIU	Economic Intelligence Unit
ERCSOP	Eighteenth Report of the Commission to Study the Organisation of Peace
EXP	Express Newspaper Tanzania
FILMUP	Financial Institutions and Legal Management Upgrading Project

FM	Family Mirror
GA	General Assembly (UN)
HRC	Human Rights Committee
HRW	Human Rights Watch
HSE	Halsbury Statutes of England
ICD	Institute of Curriculum Development
IMF	International Monetary Fund
JUWATA	*Jumuiya ya Wafanyakazi wa Tanzania* (Union of Tanzania Workers)
KAMAHURU	Kamati Huru (Independent Committee)
LAC	Legal Aid Committee
LON	League of Nations
MCR	Msekwa Commission Report
MP	Member of Parliament
MZ	*Mzalendo* Newspaper Tanzania
NAFCO	National Agricultural and Food Corporation
NCCR	National Convention for Construction and Reform
NCR	Nyalali Commission Report
NEC	National Executive Committee
NGO	Non-Governmental Organisation
NLD	National League For Democracy
NRA	National Reconstruction Alliance
NUTA	National Union of Tanganyika Workers
OAU	Organisation of African Unity
OIC	Organisation of Islamic States Conference
OTTU	Organisation of Tanzania Trade Unions

PCE	Permanent Commission of Enquiry
PMC	Permanent Mandates Commission
PDP	People's Democratic Party
PONA	Popular National Party
RDA	Ruvuma Development Association
RPCOPS	Report of the Presidential Commission on One Party System
RTD	Radio Tanzania Dar Es Salaam
SCR	Shivji Commission Report
SO	Sunday Observer UK
TAA	Tanganyika African Association
TADEA	Tanzania Democratic Alliance
TAMWA	Tanzania Media Women Association
TANGO	Tanzania Association of Non-Governmental Organisations
TANU	Tanganyika African National Union
TCOR	Trusteeship Council Official Records
TFL	Tanganyika Federation of Labour
TLC	Tanzania Legal Corporation
TLP	Tanzania Labour Party
TLS	Tanganyika Law Society
TPP	Tanzania People's Party
TTA	Tanganyika Trusteeship Agreement
TYL	TANU Youth League
UDP	United Democratic Party
UMD	Union For Multi-Party Democracy
UN[O]	United Nations [Organisation]

UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
UPDP	United People's Democratic Party
USA	United States of America
USSR	Union of Soviet Socialist Republics
UWT	*Umoja wa Wanawake wa Tanganyika/Tanzania* (Women's Union of Tanganyika/Tanzania
VOA	Voice of America
YUN	Yearbook of the United Nations

Preface

0.1. Background And The Main Focus Of The Thesis.

This work is intended to deal with human rights protection in Tanzania[1] in view of the coming into effect of the Bill of Rights which was for the first time provided for by the Fifth Constitutional Amendment Act of 1984.[2] Tanzania Mainland [formerly Tanganyika] had been a German colony from 1885 to 1917 at the end of the First World War. It then fell under British colonial rule by the mandate of the League of Nations and later in trusteeship of the United Nations, from 1919 to 1961.

After independence in 1961 the British, contrary to common practice in other former colonies, did not negotiate with the nationalists for the entrenchment of a Bill of Rights in the Independence Constitution. But this constitution did set up a system of governance in the Westminster tradition with government organs made accountable to an elected Assembly. This system was hastily abandoned only a year thereafter by the introduction of the Presidential system under the Republic of Tanganyika Constitution of 1962.[3]

It was in the process of the institution of the Republican constitutional order that for the first time the government officially considered and rejected the inclusion in the Constitution of the Bill of Rights. But related to that omission, was the gradual development of a centralised and generally unaccountable system of governance similar to and using the same organs instituted earlier by the colonial system, only with minor modifications.

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1 In this Thesis unless otherwise expressed the term Tanzania excludes Zanzibar. It is here intended to be restricted to Tanzania Mainland because of the peculiarities of Zanzibar's political and constitutional history.

2 Act No. 15 of 1984.

3 Constituent Assembly Act No.1 of 1962.

In the years that followed, democratic participation in government of every citizen irrespective of ideological belief was basically removed from the political scenario by the introduction of the one party system in the Interim Constitution of Tanzania of 1965.[1] Although seemingly enjoying popular support, the system had the effect of negating popular institutions at grassroots level. Instead were imposed state institutions from top to the very bottom, of the ten houses cell. Briefly stated civil society was during the period drastically shrunk with the possibility of no legitimate challenge for lack of a legal framework. Nevertheless enlightened and progressive forces in society never ceased to pressurise the powers that be for the re-introduction of democratic institutions. This was in spite of the practice of silencing criticism by the instrumentality of oppressive laws such as the Preventive Detention Act of 1962.[2]

Yet by the late 1970s signs of the collapse of the one-party system were obvious. Meanwhile the popular demands for change intensified. The populist party and government had to partly give in in 1982 when they commissioned a constitutional debate. It was clear from the contributions that the people were tired of the excessively bureaucratic system and wanted more democracy. The above led to the Fifth Constitutional Amendment Act of 1984 mentioned above.

This is where this study mainly focuses. It is in the connection in Tanzania, between the popular demands for democratisation and those of the Bill of Rights. The achievement of the Bill of Rights is seen as a continuation of a political process. Through demands for wider democracy the Bill of Rights was born. Moreover after 1984 the progressive forces in the country have effectively made use of the rights provided to make demands for a programme of wider democratisation. This led to the dismantling of the one-party system itself by the Eighth Constitutional Amendment Act of 1992.[3]

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1 Cap. 596 of RLT, 1965.

2 Cap 490 of ibid.

3 Act No.4 of 1992.

0.2. Research Methodology.

The conduct of this research was in the main qualitative with limited quantitative inquiry. Library research involved in the beginning a general survey of selected published works for the purposes of building a theoretical background of the subject under study. The main centre in this regard was the Library of the University of Warwick. We also visited libraries of the School of Oriental and African Studies, Institute of Advanced Legal Studies and the Commonwealth Institute in London. This was intended to cover any deficit which could be suffered by the Warwick library in terms of literature on Tanzania.

Library research was also conducted in Tanzania at the University of Dar Es Salaam. The same was done at the High Court of Tanzania and the Office of the National Assembly in Dar Es Salaam.

In the fieldwork, interviews were conducted with respondents both in and out of government. Here a problem was faced in respect of lack of co-operation from government officials especially within the Ministry of Justice. Important information was generally withheld and when given it did not meet the requirements of this researcher, the intended informants hiding under the guise of government secrecy.

As a result most of this work has more grounding in library research. However on the important question of testing the legal illiteracy of the Tanzanian general population discussed in Chapter Thirteen, structured random interviews were conducted in the city of Dar Es Salaam, and the towns of Iringa and Singida.

As it had been expected to face the problem of choice of the most viable representative sample in the circumstances, we went round this handicap by the following approaches. First was to regard the city of Dar Es Salaam as representative of the country's population, it being the biggest commercial centre with the highest attraction of the rural-urban migrations. This meant that by studying a sample of a variety of the city's dwellers one would more or less get the general picture of the situation of the country as a whole. For that reason a research questionnaire of 38 questions (Appendix V) was supplied

and filled by 100 respondents, randomly chosen at Manzese, a densely populated area in the outskirts of the City, and at Mnazi mmoja within the city centre.

However as a control mechanism, we collected similar data from inland centres at Singida, which is 709 Kilometres Northwest of Dar Es Salaam, and Iringa some 501 Kilometres away in the South Western direction.[1] The aim was to check the validity of the information from the Dar Es Salaam sample some of which could be a result of factors peculiar to the city or its people. The expected control factors were the long distances from Dar Es Salaam which is the information centre of the country, and the fact that the other centres especially Singida were proximate to the rural environment. However there is an assumption which we made using the technique of justified naiveté,[2] that at the very end of the Tanzanian society whether rural or urban, there are the majority of the workers and peasants suffering under the same yoke of the neo-colonial state. Thus the 100 respondents per centre samples were considered as clusters[3] capable of representing the Tanzanian population in the variety illustrated in Appendix VI.

From Appendix VI the respondents' gender ratio (58 per cent male and 42 per cent female) was not far from the national demographic divide.[4] It was also positive that among the officially employed respondents who were 53.3 per cent of the total, a larger part of them (83.8 per cent) were ordinary workers, also reflecting the real situation. Moreover the fact that 54 per cent of the respondents were of the age of between 18 and 35 meant that the study had rightly targeted the most active part of the population. Likewise the division of the respondents between 11 per cent, 30.7 per cent and 38 per cent for post-secondary school, secondary school and primary school education respectively, was a proper ratio in terms of the represented levels of understanding the subject matter of research. The data which

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1 See BOS, 1994: 182, Table K.15.

2 See Devons and Gluckman, 1989.

3 See Ackroyd and Hughes, 1992: 39, citing Moser, 1971.

4 BOS, 1994: 19, Table C.2 has 48.5 per cent male and 51.4 per cent female for Tanzania Mainland

was collected from this field research will feature mostly in Chapter Thirteen which deals with the problem of legal illiteracy.

0.3 Literature Review and the Contribution of this Study.

There is no published work covering on all fours the subject under research. But useful theoretical and background material can be found in Issa Shivji's *The Concept of Human Rights in Africa,*[1] which is a theoretical analysis of the relevance of human rights in underdeveloped Africa. This is an important and interesting treatment of the human rights discourse in Africa. It argues for a new perspective to human rights protection which it calls the" revolutionary discourse", a clear departure from the current and dominant discourse. In several other articles,[2] Shivji has correctly analysed the rise and fall of the state-party in Tanzania, seeing the *Ujamaa*[3] ideology as having been responsible for cushioning the people's negative reaction against the rule of the authoritarian state. According to him it is this which has enabled the country to avoid social and political crises common to other African countries. Thus he concludes that the collapse of the ideology in the late 1980s has created an ideological vacuum which nationalists and progressive forces in the country must fill with a popular based and non-statist new ideology, including a revolutionary human rights perspective.

This Thesis proceeds under similar lines but does not work towards the ideal anti-imperialist human rights discourse that Shivji proposes. We think that while those are the desirable aspirations of any progressive programme, it seems unworkable for solving the immediate problems of the oppressed

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1 Shivji, 1989.

2 Shivji, 1991b; 1991; 1995 and 1992.

3 *Kiswahili* phrase literally meaning kinship, a brand of African socialism which since 1967 became the basic ideology of the ruling party.

people. Here is a theory that sees optimism in the forging of a wider and popular-based human rights regime out of what is already available in positive law.

Relating to Chapters Three and Four dealing with the international regime, there has been substantial contribution from the works of Robertson and Merrils,[1] Sohn,[2] Bhalla[3] and Kanger,[4] among others. Indeed Robertson and Merrils' book stands to be the most in depth description of fundamental instruments on the international protection of human rights although now ten years old. Furthermore as a source book of the necessary collection of international instruments on human rights protection in Africa, a compilation by Hamalengwa, Flinterman and Dankwa,[5] is a valuable piece. However this thesis after appreciating the industry of the above authors in their presentation of the post-war developments of international law has gone a stride further by underscoring the role of the UN as a conduit pipe through which the Western liberal-democratic human rights view was given universal legitimacy. The poor countries of the World like Tanzania have been subjected to this hegemonic influence. Chapter Four has also contributed by updating the analysis of the working and impact of the enforcement measures under the United Nations human rights covenant system.

Part Two is influenced by the works of John Iliffe.[6] Iliffe's is a reliable historical source of Tanzania Mainland. The thesis has used some of his interpretations and those of other historians,[7] to reconstruct the history of the rights struggles of the people of Tanzania, giving more attention to the real actors rather than the conventional focus on the contribution of the leaders of the anti-colonial campaign. This study has made a contribution by exposing the link which has always remained blurred,

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1 Robertson and Merrils, 1993.

2 Sohn, 1968.

3 Bhalla, 1991.

4 Kanger, 1984.

5 Hamalengwa, Flinterman and Dankwa, 1988.

6 Iliffe, 1973; 1973a, 1974 and 1979.

7 Bennent, 1971; Coulson, 1882 and Sutton, 1966, 1974.

between the establishment of the post-independence anti-democratic institutions of governance and their colonial origins. This includes the regime's consistent disrespect to legality which we insist was learnt from the British colonisers.

Apart from that the record has been put straight on the question as to how the issue of the Bill of Rights was dealt with during the period of the negotiations for independence. It is emphasised in this thesis that there was no controversy on this between the nationalists and the departing colonial regime unlike in other former colonies. It was the interest of the new post-independence regime in centralised power which was the real cause of the rejection of the Bill of Rights after and not before independence. This is not available in the literature including Peter's seminal work.[1] It also does not come out clearly in the earlier pioneer work by Robert Martin.[2] Yet the former work is a useful resource material for the analysis of the Tanzania Bill of Rights' specific provisions measured in the light of international standards as set out by the relevant regional and international instruments on human rights. And as for the latter, although outdated, it still stands as the most practical analysis of the Tanzanian situation prior to the enactment of the Bill of Rights and is therefore a useful source-book for the historical treatment of the subject at issue.

For the purposes of the comparative analysis with Kenya, Ghai and McAuslan's *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present,*[3] is a reliable work despite its age. Likewise one cannot write a thesis on this topic without giving attention to Chidzero's book[4] on Tanganyika under the International Trusteeship system. Considering the period it was written, one cannot deny that it was a brilliant presentation of the subject covered. It was also necessary to look at Pratt's work on Tanzania and Nyerere.[5] Although the book is

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1 Peter, 1990.

2 Martin, 1974.

3 Ghai and McAuslan, 1970.

4 Chidzero, 196l.

5 Pratt, 1976.

a bit too optimistic about Tanzania's post-independence State oligarchy, it raises a lot of interesting issues which were deeply researched and can hardly be found elsewhere. And as regards the discussion in Chapter Seven, Patrick McAuslan and Yash Ghai's article on Constitutional Innovation in post-independence Tanzania[1] was very useful.

And finally are the three volumes of Thomas Franck's *Human Rights in Third World Perspective.*[2] These make a thorough collection of some basic material on human rights in developing countries generally. The fact that the same are a bit outdated does not water down the worth of these invaluable publications. The western scholar's analysis of the human rights situation in the neo-colonial context should be interesting to any researcher in this field.

There is little written on the subject matter covered by Part Three, and in this regard this thesis is based on original research. The other works on the Bill of Rights by Kibuta,[3] Mbunda,[4] Mwaikusa,[5] Quigley[6] and Peter,[7] are too specific and are a scanty albeit useful analysis of the Bill of Rights. They focus more on the breaches of some rights rather than the analysis of direction of the human rights cause. Conclusively it can be said that this work has gone beyond the other authors by subjecting to closer scrutiny, the origin, nature and overall impact of the Bill of Rights on the political emancipation of the people of Tanzania.

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1 McAuslan and Ghai, 1966.

2 Franck, 1982.

3 Kibuta, 1988.

4 Mbunda, 1988 and 1994.

5 Mwaikusa, 1990, 1991 and 1994.

6 Quigley, 1992

7 Peter, 1991, 1993.

PART ONE

RECENT DEVELOPMENTS AND PERSPECTIVES IN CONSTITUTIONAL AND INTERNATIONAL LAW

CHAPTER ONE

Introduction And Theoretical Framework

1.1 Continuity and change in Post-Colonial Africa

This chapter provides a theoretical framework to guide analysis in this thesis. The main problem is delineated in terms of the resolution of the contradictions of continuity and change which followed the attainment of political independence in most African countries. It is illustrated how the demise of the colonial state engendered a general crisis in constitutionalism, leading to the emergence of similar regimes of governance not different from their predecessors. The object and relevance of this discussion to human rights in Tanzania, is to show how the undemocratic institutions of governance thus created led to the misery of the people, who ironically had been the focus of the anti-colonial endeavours.

1.1.1 The Colonial State Legacy and the Post-Independence Crisis in Constitutionalism

Scholars have often observed that in pre-colonial Africa, before the colonial conquest, "seeds for the development of a democratic culture had been planted."[1] The period of nineteenth Century colonial rule in Africa provided a challenge to Western Constitutionalism and the doctrine of the Rule of law. Ironically the colonisation of Africa took place contemporaneously with the heydays of great advocates of positive Constitutionalism, such as Dicey.[2] Indeed it "was never part of the colonial political and legal order,"[3] precisely because, "a colonial administration cannot usually achieve its

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1 Kibwana, 1990:18; Gluckman, 1965:169-215; Kimambo, 1990.

2 Note that the Imperialist Partition of Africa was committed in Berlin in 1885, the same year Dicey's *Introduction to the Study of the Law of the Constitution* was first published.

3 Shivji, 1991b:28.

purposes without a total domination of civil society ...."[1] The colonial state and Constitutionalism were mutually exclusive.

According to Kibwana, colonialism had the following negative effects on Constitutionalism and democratic culture. First it disrupted the development of democratic culture, because, "Africans under colonialism were the objects not reservoirs of sovereignty and power." Secondly, there were concerted colonial efforts to implant, disseminate and universalise within the colonies, "anti-democratic and undemocratic culture."[2] However the basic problem is that Africa never "unlearned"[3] the antidemocratic and undemocratic culture, which was passed to the continent as part of the colonial legacy.

At least in the former British colonies, independence constitutions merely discontinued what Ghai and McAuslan have described as legislative dependence.[4] The same was replaced by Westminster-style of constitutional governance. Thus the significant role of independence constitutions, was to be formal, or constitutional legitimisation of what early in the sixties, the late and former President of Ghana Kwame Nkrumah, referred to as "neo-colonialism",[5] a socio-economic reality which has recently been defined as:

> "...a social and political characterisation of a system of production dominated by imperialism in alliance with compradorial classes where exploitation of labour is predicated on extraction of super profits. The mechanism of extraction of super profits is unequal exchange which can be reproduced only by use of extra-economic coercion."[6]

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1 Ghai, 1991:26. Also von Freyhold, 1979; Shivji, 1980; Reintjens, 1988; Martin, 1974:5-10.

2 Kibwana, 1990:18.

3 Phrase borrowed from ibid.

4 Ghai and McAuslan, 1970:179.

5 Nkrumah, 1965, wherein at p.ix, the author describes the essence of neo-colonialism as being the stage when, "the state which is subject to it is, in theory independent and has all the outward trappings of international sovereignty. In reality its economic system and thus political policy is directed from outside".

6 Shivji, 1991a: 49, citing Shivji, 1968.

Nevertheless although the liberal-democratic models in independence constitutions were products of, "delicate compromises reached through long negotiations,"[1] it did not take long before they fell into disfavour of the new elite rulers of the former colonies. It is argued that "most of these constitutions were of colonial origin[2] and hence the African political elite[3] which negotiated for them tended to subsequently treat the constitutions as extraneously (sic) derived and therefore not binding where they conflicted particularly with elite political and other aspirations."[4]

An important question which arises is: what were the political aspirations which conflicted with the liberal-democratic constitutional paradigm? Political practice in Africa has shown that the common objective of the ruling regimes was to assume absolute control of the newly independent state. The aim was to inspire "loyalty of the people" apart from the other challenges of nation building and economic development. This they did by doing away with a constitutional order, which allegedly posed a handicap to their program of action, in two ways. First was by removing the constitutional symbolism of the British Sovereign over their heads, lest it be undesirable impediment in future, the figurative status notwithstanding. Secondly, was by throwing overboard the liberal-democratic principles of limited government, embodied in the independence constitutions, and thereby arresting the further development of constitutionalism in the new states. It would be unreasonable to expect unequivocal commitment to Constitutionalism from the new elite rulers, as the same had been passed to them by their former colonial masters, presumably, as parting gifts.[5] They had nothing to learn on democracy from the colonial past. Nevertheless the new regime had to face a crisis in Constitutionalism the nature of which we discuss in the next section.

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1 Ghai and McAuslan, 1970:180.

2 Note that former British colonies received at independence constitutions drafted at the colonial office in London and were part of British legislation.

3 The Nationalist former leaders of the anti-colonial struggle.

4 Kibwana, 1990:26-27, referring to Kibwana, 1989:53,55.

5 For an account of how Independence Constitutions in the Commonwealth world were made and the contents thereof, see Dale, 1993.

1.1.2 The Paradox of Constitutionalism in the Search for Political Legitimacy

In a situation which appears to be self-contradictory, the crisis in Constitutionalism did not mean that the newly independent regimes of Africa did away with constitutions altogether. Instead, constitutions have continued to occupy the centre stage of political theory and practice. Indeed political legitimacy has all along been grounded in constitutional rule or rule by constitution. This is what Okoth-Ogendo has referred to as a constitutional "paradox"; "a clear commitment to the idea of the constitution and an equally emphatic rejection of the classical notion of Constitutionalism."[1]

Thus to the rulers of Africa, the necessity of a constitution is seen in the way it has been used as a legitimation act of the sovereign existence of the state itself.[2] Besides the basic law idea of a constitution is a prominent feature of African constitutions after the fall of the independence constitutions.[3] Yet, "the notion of a basic law in this context entails no element of sanctity,"[4] because there are explicit provisions in many African constitutions legalising substantial amendments, fundamental change, or even total abrogation.[5] The notion of the constitution as a basic law in Africa only means, "minimum and perhaps popular observance of the rules contained in the constitution."[6] And according to Okoth-Ogendo, there lies the crux of the paradox of Constitutionalism in Africa, where, "..the

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1 Okoth-Ogendo, 1991:3. Also Ghai, 1986:179-208; Duchacek, 1973; Elazar, 1985.

2 Through the ideology of what is referred to as "Organic Statism". See Takirambudde, 1995:18.

3 Even in situations of military dictatorships like in Amin's Uganda and in Nigeria, only selected parts of constitutions are suspended.

4 Okoth-Ogendo, 1991:6, citing as an example the abrogation of the Constitution of Swaziland by King Sobhuza II on April 12, 1973. For a detailed discussion on the manner and extent of the departure of post-independence Africa from independence constitutions, refer to Franck, 1982:1, 91-137, wherein he calls the power of post-independence states to amend constitutions, "repatriation" one form of which is "pro-forma revolution" which happens when a constituent assembly is convened to enact a new constitution. Also McAuslan, 1964.

5 Ibid.

6 Okoth-Ogendo, 1991:7; Franck, 1982:1, 91-137.

state elites have found themselves searching for the formal means by which to preserve the integrity of the "constituted policy" without being embodied in a maze of constitutional law whose function, in classical theory, is to control and supervise constitutionality". Indeed this crisis was responsible for the growth of an authoritarian state in post-independence Africa, while accounting for the simultaneous decline of Constitutionalism in the continent.

1.1.3. The Rise and Development of an Authoritarian Constitutional Order in Post-Independence Africa

We have been trying, above, to develop a thesis that colonialism is linked in some way with, among others the growth of authoritarianism in Africa. Although it cannot be said that colonialism was the only cause, it is worth noting that the autocratic colonial legal order was by some legislation,[1] inherited at the incidence of independence, especially in English-speaking Africa. The second form of colonial inheritance was, "a highly fractionalised political culture, one which sought to institutionalise conflicts and to strengthen centrifugal forces rather than nurture and cement national unity".[2] In English-speaking Africa, this was a result of the policy of 'divide and rule' of which practice had formed the core of colonial administration.

As a result of the negative effects of the political culture described above, pluralism became anathema in post-independence Africa, because social divisions were employed by the state to maximise domination, particularly of some dissenting sections of society. This may explain the demise of multi-party politics not long after independence. Instead, the political culture supporting excessive bureaucracy was favourable breeding ground for a monolithic vision of politics which was invariably justified by argument for political stability and effective economic emancipation.[3]

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1 See for example s.2 of the Judicature and Application of Laws Ordinance, Cap.453 of RLT, 1965.

2 Okoth-Ogendo, 1991:8.

3 Nyerere, 1969.

Moreover as this colonial legacy can only thrive in and is responsible for the promotion of undemocratic and anti-democratic culture, it formed the bedrock of the African authoritarian state. No wonder there was total negation of the liberal-democratic state provided by the independence constitutions, while striving for the "reconstituted power map". The same was effected through "the fusion of executive power in a single individual", thus creating an institution specific to Africa, identified by Okoth-Ogendo as the "Imperial President."[1]

The existence of the imperial presidency in Africa, is all about the process of centralisation and monopolisation of both executive and political power. And when the presidency also heads the single political party in power which is said to be supreme in a certain country, the net effect is, "the shrinking of the political arena .... Instead of expanding the area of politics ....., political parties have, instead been used to shrink it".[2]

Thus the thriving of a fully-fledged imperial presidency, marked the highest stage of the African authoritarian state. This development in the case of Tanzania is analysed in chapter Eight. What is emphasised here is that in such socio-legal and political environment, Constitutionalism, democracy, human rights and civil society had no place, whereas coercion, naked or otherwise, was the order of the day.

1.1.4. Towards a New Constitutional Order in Africa

This section of the thesis answers the question whether it is desirable and practical, to re-institute effective democratic institutions of governance in Africa, following the ongoing democratic changes in the continent. Relating to the above, is the question as to what form of Constitutionalism is relevant, beneficial and capable of meeting the demands of the people of Africa.

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1 Okoth-Ogendo, 1991:13.

2 Ibid: 15, citing Achebe, 1988. Also shivji, 1991b: 29-30, citing Hohfeld, 1979.

Among both political and academic circles, there is agreement on the idea of building democratic institutions in the Africa of the mid 1990's. Nevertheless in recent years, voices of dissent have been heard, claiming that Constitutionalism and the rule of Law are irrelevant and have not taken root in the continent, having been developed in and for Western Europe. It has also been argued, that the ideals contained in Constitutionalism and the Rule of law can be misused and misdirected by the African political leadership to create legitimacy for the existence of oppressive regimes.[1]

On the other hand a wide range of arguments has been volunteered in support of a new constitutional order in Africa, insisting on the importance of Constitutionalism and the Rule of Law in the Continent.[2] First it is insisted that the broad rights and freedoms as comprised in African constitutions and based on the relevant universal instruments,[3] can be effectively used to develop in the region democratic culture and civil society, which remain lacking. Secondly the guarantee of such rights and freedoms can only be possible in an environment where there is political will to adhere to the constitution, Constitutionalism and the Rule of law.

And thirdly, is the fact that the content of the rights and freedoms of the people can easily be increased, if an expansive view of Constitutionalism is advanced, the one which includes among others, "basic freedoms, widespread sharing of governmental powers, participation of popular masses, etc."[4] In that way, Constitutionalism and the Rule of law can be used as a waging ground in the war against disctatorial regimes, and even for anti-imperialist struggles of all progressive forces in the continent.

It is clear that the above justification for a new constitutional order, is basically a demand for the reclamation of the liberal-democratic view of Constitutionalism. This view has not received full support. What is in agreement is the answer to the issue whether

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1 See Ghai, 1989.
2 For a summary of such arguments, see Kibwana, 1991:28.
3 And mainly draws from Western experiences.
4 Ibid.

Africa needs constitutions, which is in the positive for they "do matter".[1] But there is little agreement as to the form and content of constitutions in Africa.

There are African scholars who have accepted the reproduction in total, of the form and content of the Western liberal-democratic view of Constitutionalism.[2] In line with the above view, it has been assumed that the proper model for the Africa of tomorrow is the same constitutional package which was rejected after independence. Moreover it has been given as a condition for the restoration of the liberal-democratic vision of Constitutionalism in Africa: that the latter must experience history, lived by Europe before these principles crystallised into legal norms between the 17th and 19th centuries. According to Okoth-Ogendo:

> "What then will it take to develop a tradition of Constitutionalism in Africa? I am inclined to the view that Africa is destined to experience struggles and disappointments similar to those through which the older political systems went before viable mechanisms of the control, supervision and accountability can be developed and internalised. That may be a severe position to take; but what it says is that history cannot simply be learnt, it may have to be lived as well. Constitutionalism being the end product of social, economic, cultural and political progress can only become a tradition if it forms part of a shared history of a people".[3]

The author, by saying that history must be lived and not only learnt, can be understood to be explaining why the liberal view of Constitutionalism imposed on Africa at independence collapsed immediately thereafter. The same was not lived during the colonial era, and yet, it was expected to be learnt immediately thereafter!

Surprisingly, his words underscored above seem in contrast to be calling for concerted struggle involving all the people Africa and their institutions, towards developing a tradition of Constitutionalism, as derived from their history and experience. Such Constitutionalism cannot be exactly the same as the liberal-democratic vision; neither does it have to come out of living the history of 17th Century Europe.

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1 Okoth-Ogendo, 1991:20-26, citing Finer, 1979:16.
2 For example Nwabueze, 1973:10.
3 Okoth-Ogendo, 1991:21. Added emphasis.

However there are at least two major approaches to the form of Constitutionalism in Africa. The first approach is the one which sees the revival of Constitutionalism in terms of upholding certain minimum standards, which are fundamentally necessary for the development of democratic culture and civil society.[1] This is sometimes referred to as the liberal approach.[2] The second approach as represented by the demands of the progressive outlook, provides for maximum conditions wherein, Constitutionalism can possibly exist in some specific form and content.[3] The advocates of the latter school are also known as communitarians or collectivists.[4] The issue which arises is whether for the overall benefit of the ordinary people of Africa, it suffices to choose either of the two approaches. This assumes that the two are mutually exclusive.

We noted above that there is no disagreement on four aspects. First, that the colonial socio-legal order knew nothing of Constitutionalism. Secondly, that at independence the former colonial masters passed to the newly independent nations the liberal-democratic model of Constitutionalism. Thirdly, that immediately after independence in most countries of Africa, the independence constitutions were dumped by the new African ruling regimes, for a new constitutional order, which in turn led to the emergence of authoritarian state in the continent. And fourthly, that there is great need now in Africa of a new Constitutionalism.

Undoubtedly, a wholesale re-institution of the Western liberal-democratic Constitutionalism to the present African context is as undesirable as transplanting an English oak to the continent.[5] This presents validity of the view that the new Constitutionalism must conform with the requirements of the present socio-political environment of Africa. But,

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1 Ojwang, 1991:62-70, citing Vile, 1967; Kibwana, 1991:28.

2 Maluwa, 1997:63. Also Howard, 1992:2.

3 Shivji, 1991b:32-44, referring to Hyden, 1980, Amir, 1987, Kimambo, 1969, Mamdani, 1988, Moroke, 1987:82-83, and Gittleman, 1984.

4 Maluwa, 1997:63-66.

5 Simile, coined by Lord Denning in the Privy Council decision of *Nyali v. Attorney General of Kenya[1956]1.Q.B.1.*

does that completely render irrelevant the whole content of the liberal-democratic view of Constitutionalism? The first approach in charting out a set of minima necessary for Constitutionalism does still see a lot of relevance in the liberal-democratic paradigm. On the other hand, the second approach has condemned this view as being linear. It looks at the liberal-democratic version of Constitutionalism as only promoting the interests of a particular social class, and not the people in general.[1]

The resolution of this conflict of approaches lies in identifying what these schools see as the real problem at issue in the African constitutional crisis. It seems clear that the basis of difference between the approaches has something to do with the scope or the level at which they have chosen to analyse the problem of authoritarianism in Africa. The approach which argues for minimum standards of Constitutionalism seems to be inward-looking; considering the problem as primarily African, and only secondarily tied to the continent's imperialist domination. Thus it is seen as a panacea, the adoption of some liberal democratic norms of Constitutionalism which conform to local circumstances in order to create democratic culture and civil society. It is assumed that if the same are appropriately maximised, they would render the authoritarian state in Africa irrelevant, for the betterment of Constitutionalism and human rights.

On the other hand, the second school arguing for the maxima locates Africa's problem of authoritarianism outwardly. That it is in essence part and parcel of the process of imperialist domination over the Continent. Thus it sees the right to self-determination as the most central and primary right, first in terms of economic emancipation, and then at the socio-political level. It is emphasised that once the people have a system, whereby they are capable of determining their own interests at all levels, then authoritarianism or militarism will have no place in Africa.[2]

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1 Shivji, 1991b:28-33, criticising de Smith, 1962.

2 Ibid. 39-46

The position adopted in this thesis is that these approaches are in no way divorced from each other, and therefore there is no need for Africa to choose between them. Having in mind the colonial reality, and the fact that independence only ushered in a new version of colonialism, one cannot doubt the emphasis made by the second approach on the role of imperialism in the African constitutional crisis. But it cannot be wholly correct to brand as counterproductive any resort to some liberal-democratic principles of Constitutionalism, if the same can effectively be used to deal with a particular problem, be it immediate or otherwise. It will always depend on the purpose, and whether the project is for the benefit of the masses of Africa. In Part Three of this Thesis, it shall be shown how rights may be effectively utilised in the form of the "general political struggle", a larger and more focused program for social and economic liberation, or even revolution.

After all, history has already shown that attainment of the people's self-determination does not necessarily guarantee democracy. It was not long after the states of the former socialist block had attained a social-democratic revolution, that they turned into bloody and extremely bureaucratic and authoritarian regimes. The dictatorship of the proletarian majority of the citizenry, in effect became the autocracy of the so called revolutionary leaders in the politiburos and party committees. As Howard says, "the collectivist perspective that focuses either on the nation or the people, at the expense of the rule of law and individual civil and political rights, necessarily contains the seeds of undemocratic repression..."[1]

It must be underscored that, the people of Africa, in about three decades of independence, have continued to endure the yoke of imperialism in a double-edged manner. While they are being marginalised by imperialism as a community of nationalities in a particular state at national level, they are on the other side as individuals, families, communities and other social groups, confronted and oppressed by the authoritarian state

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1 Howard, 1992:7.

piloted by compradorial leaders of their own kind; and this is their immediate problem. Thus while it may take years or even centuries to liberate Africa from imperialist domination, the process of restoration of democratic culture and civil society in particular societies, may be an ongoing process through what are known as mini discourses, including rights struggles.

The net effect of the above, could ultimately be what the progressive outlook is committed to. Indeed it is part of the main hypothesis of this work, unless the culture for the respect of human rights is cultivated, constitutional protection thereof will remain futile. Therefore we proceed from here to build an inter-institutional argument to answer the question whether such culture has started to be realised in Tanzania, and if not, what are the hurdles to be surmounted. But before that there are several issues in constitutional theory to define.

1.2 Human Rights, Democracy and Constitutionalism in the Context of Africa

This section considers the causal relationship between democracy and Constitutionalism, as far as they relate to human rights in Africa. It underscores the point that the coexistence or linkage of these constitutional ideals in a particular society necessarily leads to the creation of democratic culture and civil society.

Constitutionalism and protection of human rights may be understood to be referring to the presence and functioning of democratic institutions. The problem is that it does not always follow that there is democracy where there is a guarantee of human rights, and vice-versa. Yet in the context of Africa, recent scholarship tends to associate the two, which demands for a specific definition of this relationship. Being an ancient concept, there are many definitions of democracy. But generally it has been described in the African context as "essentially a social and political condition under which citizens feel free to criticise and censure in good faith their government, particularly senior government officials without fear and the occurrence of reprisals whatsoever."[1] The above outlook is apparently not

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[1] Kibwana, 1991:14. Also Gitonga, 1987, Cooray, 1984, Nwabueze, 1973.

different from the liberal-democratic view. However it becomes peculiar when in the circumstances of post-independence Africa, it demands the progressive empowerment of individuals and collectives, as well as a corresponding disempowerment of the authoritarian state.[1]

The above being the case, there is a tendency in Africa to treat democracy and human rights as if they are synonymous.[2]

In the words of Rosas, "in today's human rights of discourse, democracy and human rights appear as Siamese twins: they seem not only to presuppose each other but also to be genuinely intertwined."[3]

The two concepts are certainly not synonymous although in the context of post-independence Africa, one does not speak of promotion of human rights without concerning oneself with democratic emancipation at the same time. Indeed in today's African political discourses, human rights and civil society are seen as part of democracy.[4] Actually the proximity between human rights and democracy was very visible in Tanzania during the post-1990 democratisation process which is discussed in Part Three of this thesis.

The other problem relates to the idea of the protection of human rights on the basis of the Constitution. There is a lot in common between constitutionalism and the domestic protection of human rights. More or less, both of them have something to do with constitutions, particularly those which are written.[5] On the part of human rights, most post-independence constitutions of Africa, comprise, "broad freedoms extracted from the United Nations Charter and other universal instruments.[6]

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1 Baxi, 1989:108-9.

2 The literature on this subject include Bealy, 1988; Schumpeter, 1993; McPherson, 1993; Dyzenhaus, 1991; Harris, 1993; Ake, 1987; Nagan, 1992; Motala, 1989; Shivji, 1989; Cobbah, 1987; Howard, 1986; Eze, 1984; Mutua, 1995; Takirambudde, 1995; Reisman, 1985; Decalo, 1992; and Kunz, 1990.

3 Rosas, 1990:17. Also see Nyong'o, 1992:21-22.

4 Although there are instances where human rights may be seen to be limitation upon democracy. See Maluwa, 1997:67-68, citing Rosas, 1990:17.

5 Most African countries have written constitutions, unlike Britain which doesn't have one. For a discussion of the unwritten constitution of Britain and the possibilities of introducing a new written Constitution to the Kingdom, see *inter alia* McEldowney, 1994:3-19, Chapter One and 689-694, Chapter 21: also Wade, 1993:424-430.

6 Particularly what is now known as the International Bill of Rights which includes, UNGA 1948, UNGA, 1966 and UNGA, 1966a; of which detailed discussion will follow below in Chapters Three and Four. Citations of the above international instruments have been taken from Harnum, 1992:291, Appendix F.

Indeed the recent trend in Sub-Saharan Africa has been not only to elevate certain specified rights to constitutional status through their entrenchment in a Bill of Rights but also to adopt the notion of "constitutional supremacy" while abandoning the doctrine of "parliamentary sovereignty".[1]

And as for Constitutionalism, the idea thereof basically involves strict adherence to the principles and norms as comprised in a constitution, although not analogous in scope with constitutional law. Indeed, "legitimate acceptable constitutions must reflect respect for constitutionalism including, in particular, respect for the principle of the 'rule of law' and individual human rights.[2]

The issue ensues as to whether by relying on the constitution, human rights protection should be restricted to the terms of constitutions, which leads to another question as to what exactly is meant by constitution. Wade and Bradley, have endeavoured to provide both narrow and wide definitions of a constitution. According to these authors, ".. in the narrow meaning of the word, a constitution means a document having a special sanctity which sets out the framework and the principle by which those organs operate." Thus in this view, Tanzania has a constitution, while Great Britain doesn't have one. But the authors give a wider definition of a constitution which "refers to the whole system of government of a country, the collection of rules which establish and regulate or govern the government". This includes the Constitution of the United Kingdom which has a system of government, "founded partly of Acts of Parliament and judicial decisions, partly upon political practice, and partly detailed procedures established by the various organs of government for carrying out their own tasks, for example the law and custom of Parliament."[3]

Another attempt distinguishes the abstract from the concrete definition. The abstract definition looks at the constitution as, "system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen." And as for the

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1 Maluwa, 1997:56 referring to the Constitutions of Namibia, South Africa and Malawi.
2 Ibid. 56.
3 Wade, 1993:4-5.

concrete definition, "constitution is a document in which the most important law establishing the structure and principles of government are embodied."[1] It seems clear therefore that, whereas the abstract definition tallies with Wade and Bradley's wider definition, the concrete one is on all fours with the author's narrow view of the constitution.

However a simpler way of describing a constitution without enduring the pain of coining definitions has been offered. This involves understanding what a constitution implies by looking at its functions, its addressees, and its character and form.[2] But most important is the fact that it is essential to underscore the special place constitutions are given in the legal system, as well as in the whole society. Its sanctity has been invariably described using various terms, such as, Basic, Principal, Fundamental etc. Apart from that, whatever form of constitution making is involved, that is, whether the document resulted from a civil war like in the case of the United States, or a process of de-colononisation like in many African countries, and other forms, the constitution's political significance and sacredness lies in the fact that "a constitution is a thing antecedent to a government and a government is only a creature of the constitution ... A constitution is not an act of government, but a people constituting government, and government without a constitution, is power without a right".[3] And what about the subject matter of Constitutionalism?

Not necessarily restricted to legality like constitutional law,[4] Constitutionalism as a principle, traditionally revolves around the idea and belief in limited government.[5] That is, "that the exercise of government power, which is essential to the realisation of the values of their societies, should be controlled in order that it should not itself be destructive of the

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1 von Munch, 1994:13-14

2 von Munch, 1994:14-17; van Maarseveen, 1978:275 et seq; Norton, 1984:3

3 Wade, 1993:5

4 Ibid:9

5 Ibid. citing Wheare, 1966:6

values it was intended to promote."[1] This means that the idea of Constitutionalism transcends the borders of constitutions, and must derive from the general will and interests of the people.

The above view implies that, "Constitutionalism simply means the conduct of government within a system of checks and accountability." This definition is said to be based on the "profound values of humanity and human society," which, "revolves around self, around the individual" as, "the first and foremost objective is that of protecting the individual member of the political community against interference in his personal sphere of genuine autonomy. It is his self that each man presumably wishes to have safeguarded."[2]

It is here that we witness the causal connection of Constitutionalism to human rights. In fact, the latter are the subset of the former, using some mathematics jargon. But what should be emphasised is the fact that, even in its narrowest conceptualisation, Constitutionalism is a wider principle than constitutional law. Thus in the case of human rights protection, at the pure legal plane, constitutional law comes into play to define the relevant norms as comprised in a particular constitution, whether or not the same are justiciable. But human rights discourse within the sphere of Constitutionalism goes beyond the strictly legal sub-system, when for example, rights are articulated with some political or even revolutionary dimensions or whatever, for the purposes and in the interest of the whole populace.

Making this distinction is important in Africa, where for a long time after independence, the study of constitutional law was restricted to, "the broad survey of the text of the constitution, other relevant laws and a few cases that [had] arisen in the courts on the constitution,"[3] not to mention, "the absence of authoritative or any rigorous analysis, even by social scientists, of the relationship between power and law in Africa."[4] Moreover the above is what created close ties between human

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1 See Vile, 1967:1; de Smith, 1973:3 et seq; 1962:1962:205.
2 Wade, 1993:5
3 Ghai and McAuslan, 1970, as cited in Okoth-Ogendo, 1991:3.
4 Ibid.

rights, Constitutionalism and the study of politics. Actually the provision of human rights in constitutions is nothing but expression of political activity, although not much has been done to explore this relationship.[1] In the process of identifying a working conceptual framework to guide the analysis of human rights practice in Africa, the section below discusses the position of human rights in political theory. This is important because the main case study in Part Three of this Thesis is about the employment of political rights in Tanzania.

1.3 Human Rights in Modern Political Theory

This thesis portrays human rights in three different outlooks. First as rights claims in their Western development. Secondly in globalised form within the United Nations system. And thirdly as rules of positive law within the domestic plane in Tanzania. The aim is to impress on how all the three variables are reflected in the content of the Tanzanian Bill of rights, and thus argue as to how the same may be geared towards an effective and popular-based human rights regime in the country. The problem to be addressed is that political theory has not consistently articulated the role of human rights. The main theoretical question has related to the demarcation of the human rights discourse, invariably the philosophical credential of human rights being found to be wanting.[2]

For that matter natural rights were denounced by Bentham as "simple nonsense, ... imprescriptible (sic) rights, rhetorical nonsense - nonsense upon stilts".[3] One has also to mention Karl Marx's dismissal of rights thus: "none of the so called rights of man goes beyond egoistic man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community".[4]

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1 Beetham, 1995:1. On the notion of the political nature of the human rights movement see Kristol, 1986:349

2 Mendus, 1995:10

3 Bentham, J., *Anarchcal Fallacies,* as printed in Waldron, 1987, and cited in Mendus, 1995;10.

4 Karl Marx. *On the Jewish Question*, printed in Waldron, 1987:53.

The above philosophical scepticism against human rights did within the modernist thinking engender two competing trends which have generally influenced the modern human rights discourse both in content and form. The first is known as the foundationalist approach which based the justification of human rights on the human reason and moral foundations.[1] Briefly stated this trend by insisting on humanity as the basis of human rights was advocating for their universal character.

Contrary to that the Marxist scepticism created the relativist trend which consistently condemned possessive individualism inherent in human rights, for being against the communitarian ideal, the basis of the political ideology of socialism. The critique presumed a continuous antagonism between the interests of individuals and those of the state, the focus of all socialist endeavours. This thinking became responsible for the ambivalent attitude of socialist countries during the post-war human rights international negotiations as will be illustrated in Chapter Three. All the same the overall impact of this philosophical trend has been the widening of the field covered by human rights, to include economic and social rights.

In between and denouncing the above trends can be identified the constructionist approach. This school emphasises rationality as the basis of the universal character of human rights. That it is only those rights which are rational which will be accepted by all people. This school expresses the scepticism of some Western countries especially the United States about an expanded human rights field which includes such notions as collective rights as we shall discuss in Chapter Five. But the main problem of this theoretical framework is the difficulty of finding the standard of rationality to fit all humankind.

In any case this theorisation of human rights characteristic of weberian modernist thinking[2] is already outmoded.[3] In the present postmodernist era human rights theory has

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1 Mendus, 1995:12, citing Lukes, 1993:20.

2 See for example Weber, 1946.

3 See critique of modernism in among others, Bernsten, 1993; Bernstein, 1991; Wellmer, 1985 as cited in Bernstein, 1993:334; Lyotard, 1984; and Habemas, 1985.

assumed a deconstruction of the modernist universal truths. Instead rights are now conceptualised as "diverse and fluid".[1] One has seen in the past few decades the emphasis in social sciences on the effect and importance of Michel Foulcault's mini discourses.[2] In the case of the leftist scholarship the definition of rights has gone beyond economic determinism. The same now emphasises how the moral compulsion behind rights can be used to justify anti-state social action such as civil disobedience and other types of social protest.[3]

In this regard, Gramsci's counter-hegemonic theoretical methodology has invariably been appreciated as the basis for the new perspective on rights.[4] It will indeed advance the Tanzanian struggle for democratic emancipation against hegemonic forces, if the same is waged at any possible level of social organisation, involving any available social phenomena, being widespread and integrated movement, free of modernist nakedly antagonistic thinking.[5]

What we see in rights now are common denominators which prescribe the universal character of rights, such as the solidarity among all nations against the repetition of the holocaust. This is what makes rights be regarded as "bulwarks against evil"[6] But the categories of things that are evil to humanity are not closed, and thus the doors are open for specific conceptualisation of rights in particular space and time. Briefly stated the new methodology has reduced the role of the state in leftist scholarship, giving room for the articulation of pluralism, while maintaining the progressive/revolutionary? outlook. With this theoretical methodology we move to consider how human rights have been conceptualised in Africa.

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1 Ibid.23.

2 On Michel Foucault (1926-1984), particularly on his thesis on 'discursive formation', see among others, Foucault , 1972, Gutting, 1994; Hall 1992.

3 See among others, Dworkin, 1971, Campbell, 1983.

4 See critique of the American Critical Legal Studies paradigm in Bartholomew and Hunt, 1990; and on Gramschi generally see Bocock, 1986; Cain, 1983.

5 For more discussion on the impact of the Gramscian Counter-hegemonic theory on the rights struggles in Tanzania, see infra at the end of this Chapter.

6 Mendus, 1995-23.

1.4 The Conceptualisation of Human Rights in Africa

In this thesis, the Bill of rights is considered as a way of regulating if not influencing change of power relations between individual citizens and their state authority. Certainly the net effect thereof is the ultimate emancipation of the ordinary masses of individuals from day to day oppression in the hands of the agents of the government machinery. In no way are human rights seen as the end in itself, in the sense of providing solutions to all social and economic problems of the ordinary population. All the same we argue that a guaranteed individual liberty in a particular country is an important minimum legal and political demand which if adequately satisfied can boost the other sectors of social life including economic development.

The problem which ensues relates to the theoretical validity of the position stated above. There are four main trends of articulating human rights in Africa.[1] The first is the dominant western-liberal view. This regards human rights as universal standards of behaviour applicable against all states and for the benefit of all people. There is an obvious over-emphasis on the universality aspect, in the sense of international application of these rights as embodied in instruments of international law. These regard states as well as individuals thereof as equal partners irrespective of economic, cultural, historical and geographical differences. The same is seen as true in domestic jurisdictions where rules of law enshrining the said rights in constitutional provisions or otherwise are said to apply equally to all people without due regard to their class affiliation.

The second trend is what is known as developmentalism. Attempting to avoid the effect of the omnibus adoption of the western inherited models of civil liberty guarantees but without having the audacity to oppose them thoroughly, some African independence regimes invariably used the "priority" argument with much effect. It was stressed that what was central to newly independent African states was economic development and not the

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[1] Shivji, 1991b: 9-42.

niceties of civil and political rights. This will be discussed in the case of Tanzania in Chapter Eight.

Thirdly the cultural-relativist trend argues that human rights relevant to Africa are those fashioned to community rights of the continent's pre-colonial societies, whose influence it is pointed out still rules contemporary Africa.

And finally is the revolutionary trend which calls upon a new outlook of human rights as part of class struggle, while locating the African people at the centre of the whole scenario. It is argued that it is the people collectively who should be the main participants as well as the focus of the whole process. It is underscored that concern should be directed towards the full exposition of the anti-African people forces of imperialism and its compradorial ruling African state regimes. This conceptual framework does not only oppose the cause and content of the western-liberal view but also seeks the complete overthrow of all the dominant trends of the human rights discourse in Africa.

Although one may see the rationale of the western-liberal argument of universality of human rights in the sense of their being inherently human, the rest of the conception is both ahistorical and hegemonic. The human rights package which has for about three decades of independence been exported to Africa is essentially European both culturally and historically. This is discussed in Chapter Two. Apart from that there is ample evidence past and present indicating the use of human rights for hegemonic ends, such as when provision of economic aid to ailing economies of seemingly non-conformist African regimes is tied to certificate of clean human rights record.[1] But does that render human rights irrelevant in Africa? We choose to answer that question in the negative for the following reasons.

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[1] See generally Tomaseviski, 1993. On the discriminatory use of the policy by US governments see Forsythe, 1995. And for the support of the policy see Achaempong, 1995:18, and McAuslan, 1996 supporting the measure on account of the mismanagement of economic aid by corrupt African regimes.

When we say that human rights as exported to Africa are culturally European in form and content, we are driving home the point that for the same to be of any use to the masses of the continent, they must progressively be tuned to operate against anti-democratic forces.

As for the developmentalist trend, this view is now in the decline as the atrocities caused by various authoritarian state regimes which espoused it after independence are evidence of the failure of this school of thought. Under the scheme, most African countries have ended both without democracy and economic development. Yet it is interesting to note that while recently there has commenced in Africa a liberal-democratic style democratisation process, there has also been identified some corresponding development of the anti-Third World attitude in the West. This is marked by endeavours to rehabilitate imperialism by the overt marginalisation of African forces of genuine nationalism, allegedly on account of a failed anti-colonial revolution.[1] Nonetheless there is no choice to be made by the African progressive forces as between the post-independence authoritarian state and the rehabilitated imperialist forces. The only way out is the resurrection of popular and democratic institutions without which development will remain dreamland.

The cultural-relativist trend which is sometimes described as "romantic",[2] is idealistic and valueless as it does not take into account the devastating impact of colonial domination on pre-colonial African values, and misconceives the peculiar nature of the neo-colonial state in the continent. At most this line of reasoning was employed by some post-independence African leaders as a populist political theory seemingly departing from the conventional western view while at the same time remaining in essence part of the same package.

As for the revolutionary trend, we see it as the ideal type working for the total emancipation of the African masses from the whims of imperialist domination. But the ensuing question is whether this pure model of theoretical framework is capable of being of any assistance in the prevailing environment of human rights violations in Africa. This

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1 Furendi, 1994: 98-119, Chapter 6.

2 Eze, 1984; Chapter 2, as cited in Shivji, 1989:13.

question should be considered in the light of the progressive decline of the working class ideology while the Continent intensifies imperialist connections by the enslavement of itself to the anti-people austerity measures of the international financial institutions.[1]

From the background described above we have devolved our theoretical framework in this regard. This may be explained as follows: Although made by the state for imperialist interests, we regard human rights guarantees in positive law as important tools at the service of the suffering masses of Africa at grassroots level. To the ordinary man constantly living under threat of coercion of the organs of the neo-colonial state, civil liberties become as important as one's daily bread. These minimum demands of the people must be effectively enforced as part and parcel of their participation in the overall democratic struggle. It follows therefore that to make the largely legally illiterate African population realise that these rights exist albeit with limitations, and that the same can be enforced against the seemingly omnipotent state authority, is a remarkable beginning of the said struggle. That is why it is an important hypothesis of this study that unless the majority of Tanzanians are made legally literate, the rights enshrined in the Bill of Rights will remain meaningless, and of no use in their continuing rights struggles. Legal illiteracy will be discussed in Chapter Thirteen of this thesis.

Indeed what is relevant for Africa's human rights discourse is the Gramscian counter-hegemonic strategy which has to start from what exists, which involves starting from "where people are at". Such conception of counter-hegemonic forces requires the "reworking" or "refashioning" of the elements which are constitutive of the prevailing hegemony.[2] According to Gramsci, it is not a question of introducing from scratch a scientific form of thought into everyone's individual life, but of renovating and making "critical" an already existing activity.[3] What is already in existence in our context are the Bill of Rights provisions as entrenched in the Tanzanian Constitution. The first step to be

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1 Stein, 1992 and Kiondo, 1992.
2 Hunt, 1990:313.
3 Lorain, 1983:84, cited in ibid.

undertaken is "to supplement that which is already in place, to add or to extend on the existing discourse".[1] However the significant stage will be "the putting into place of discourse, which whilst still building on the elements of the hegemonic discourses,[2] introduce elements which transcend that discourse".[3]

What this strategy ultimately leads to in the final analysis is the "dying away or exhaustion of elements once dominant",[4] and certainly the rising in prominence of new elements, in this context, the pro-African people's emancipation human rights discourse. In Foucault's methodology,[5] we are invited to view the general opposition against imperialist domination of the African people and their liberation in "specifically located struggles",[6] against the day to day violations of civil liberties and any other rights.

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1 Hunt, 1990:314.

2 That is, the dominant human rights discourses in Africa enhancing the ultimate interests of imperialism and the compradorial state regimes.

3 Hunt, 1990:314.

4 Ibid.

5 Turkel, 1990:170.

6 See Turkel, 1990:171; Also Kritzman, 1994.

CHAPTER TWO

Western Philosophical Roots of Human Rights

This chapter traces the historical roots of the dominant human rights discourse.[1] It shows how human rights and other related principles of constitutional law were nursed and developed out of specific social changes in the history of Western political thought. The point of emphasis is in how these norms have invariably served as legitimating factors in different historical periods and for varying socio-political interests.

2.1. Human Rights in Western Political Thought.

Lawyers often find themselves in problems when dealing with history.[2] One is likely to be accused of "antiquarianism" a label given a century ago to the legal historian Freeman by Dicey.[3] History is relevent to a lawyer when it is used to unfold facts and past happenings which are directly related to and precisely contribute to the understanding of the nature and characteristics of legal rules as they exist today. This should be true of the study of human rights in a country which is distant from the socio-political environment wherein the same were originally developed.

Human rights principles and aspirations in the form of natural law and rule of law principles, have been known for many centuries since the early civilisations of Greece and Rome.[4] They have also been related to the utilitarian notion of the principles of law and the purposes of legislation. However if there was a time in history when human rights norms and procedures developed and

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[1] On the nature of the discourse see Shivji, 1983.
[2] This is also noted by McEldowney, 1985:41.
[3] Dicey, 1885:17.
[4] See Lloyd, 1979; Harvey, 1961.

crystalised into specific philosophical concepts, it was the era of the European Renaissance from about the 17th Century. This period marked the beginning of the demise of feudalism with its aristocratic state.

In the process of attempting to redefine the state and its relationship with the individual, the philosophers of the time ended up with a new conception of natural law. Rather than basing it in the divine sources as it had previously been the case, gradually the principles assumed a liberal outlook aimed at liberating the individual from the chains of `status' characteristic of the feudal system. This ushered in a new era of freedom of movement and social activity. Indeed the principles and ideas which emanated from this process, were ideological weapons at the disposal of the rising middle classes in their protracted struggles against the feudal aristocracy and the absolutist state.

Actually the writings of the great thinker of the time Thomas Hobbes(1588-1679), have been described as marking "a point of transition between a commitment to the absolutist state and the struggle of liberation against tyranny".[1] Hobbes was clear of the intent of his writings which he said, it was "to make a more curious search into the rights of states and duties of subjects".[2] He will always be remembered for being the first "to try to grasp the nature of public power as a special kind of institution as he put it, an "artificial man", defined by permanence and sovereignty, the authorised representative "giving life and motion" to society and the body politic".[3]

Another important thing in Hobbes' philosophy was his advocacy of the existence of a social contract between the sovereign and the people.[4] Thus in spite of criticism levelled against Hobbes, it is interesting to note the influence his ideas have on the present form and content of human rights, in particular, the centrality of the individual versus state relationship. Apart from that there is not much difference between the `mortal gods' running the 21st century state institutions, in particular the one-party states of Africa, and Hobbes' `all powerful Leviathan'. Without mentioning all the main

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[1] Held, 1983: 3.
[2] Hobbes, T., *De Cive*, (1942), as quoted by Held, ibid.
[3] Held, 1983: 4, referring to McPherson, 1968:81
[4] Ibid: 10.

thinkers of the period, attention must be given to Locke and Rousseau before we conclude this section.

2.1.2. The Impact of Locke's Liberalism.

John Locke(1632-1704), having approved the revolution and Act of Settlement of 1688, which imposed constitutional limits on the powers of the English Crown, "rejected the notion of the great Leviathan, pre-eminent in all social spheres, an uncontested unity establishing and enforcing law according to sovereign's will."[1] According to him, "the state can and should be conceived as an `instrument' for the defence of the `life, liberty and estate' of its citizens; that is, the state's *reason d'etre* is the protection of individuals' rights as laid down by God's will and as enshrined in law."[2]

Locke's liberalism departed from Hobbes' thinking possibly because he was writing while witnessing the actual changes in the process of the bourgeois revolution. While dismissing Hobbes' omnipotent Leviathan, he placed "a strong emphasis on the importance of government by consent-consent which could be revoked if government and its deputies failed to sustain the "good of the governed."[3] Thus Locke can be regarded as the father of the notion of `constitutional legitimacy', which fills contemporary literature on constitutional law and practice.

2.1.3. The Relevance of Roussaeu's Participatory Democracy.

This leads us to the idea of participatory democracy of which first expounder is Rousseau (1712-78), another liberal democratic philosopher. By the time Rousseau was writing, the idea that the consent of individuals legitimates government was well established following the ideas of Hobbes and Locke, who had "regarded the social contract as the original mechanism of individual

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[1] Dunn, 1969: Part 3.
[2] Held, 1983:20
[3] Held, ibid: 21.

consent." Although Rousseau did not oppose the social contract argument, he discarded the claim by both Hobbes and Locke that sovereignty is transferred from the people to the state and its rulers by virtue of such contract. According to him, "sovereignty not only originates in the people; it ought to stay there." [1] Thus unlike his predecessors, Rousseau was advocating for a social contract which brings about to the people, real self-regulation and self-government. In his most extreme formulation he insisted that:

> "the governed in essence, should be the governors... the idea of self-government is posited as an end in itself; a political order offering opportunities for participation in the arrangement of public affairs should not just be a state, but rather the formation of a type of society-a society in which the affairs of the state are integrated into the affairs of ordinary citizens."[2]

Rousseau's emphasis on the importance to and centrality of true democracy, of people's participation into all public affairs irrespective of elected representation, is relevant to the current debate on the role and the rights of popular institutions in democratic governance. This theme will feature in Chapter Ten in the Tanzanian context.

Moreover the liberal-democratic thinkers had influence on social revolutions such as the English Glorious Revolution of 1688, and the French Revolution of 1789. It is not intended here to discuss these important historical occurrences. Likewise liberal-democratic philosophers have contributed to present day thinking about human rights. Just to mention a few aspects, it is them who suggested " the importance of securing the rights of individuals, popular sovereignty, majority rule, and a division of powers within parliamentary government."[3] It is these same principles which still rule present-day constitutionalism. This study argues that these have universally been made the minimum standards for the development of a pro-democratic culture, the fertile ground for the protection, promotion and enforcement of human rights in any country.

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[1] Ibid
[2] Ibid:22
[3] Ibid

Nevertheless, one has to come to terms with the class nature of the individual rights. It has thus been observed that:

> "The new freedoms were first and foremost for men of the new middle classes or the bourgeoisie. The western world was liberal first, and only later, after extensive conflicts, liberal democratic or democratic; that is, only later was a universal franchise which allowed all mature adults the chance to express their judgment about the performance of those who govern them".[1]

In the same vein the class nature of the liberal-democratic norms and principles has been described as forming "marketist, individualist ideology" which transferred "the ideals embedded in the rule of law ...from a clear substantive morality to something much more loosely based in procedures and institutions with only a cloudy civil libertarian notion of substantive morality."[2] Therefore it looks absurd for the great campaigners of human rights in the Third World, including the United Nations institutions, describing them as "universal standards".

2.2. The English Origins of Rights:

Fundamental rights in England have for centuries been promoted and protected by the courts through Common law. Statements marking some early beginnings of human rights were made as far back as the 13th Century by the *Magna Carta*(1214-5). This old document is invariably mentioned by may researchers in this field because of its overall socio-legal and political significance. That is by the fact that the same came about after long and protracted struggles after which King John was forced by the Barons with the compliance of the Church and the Nobility, to surrender and compromise some of his powers.[3]

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[1] Ibid.
[2] Harden and Lewis, 1986:18
[3] See Palley, 1991:4.

Moreover among the provisions relating to the new rules for the Nobility and other feudal relationships, one sees some interesting stipulations in this regard, such as for example article 42 which has something to do with the crude origins of the now well known freedom of movement. It stated as follows:

> "It shall be unlawful in future for anyone (except always those imprisoned or outlawed in accordance with the law by the Kingdom, and natives of any country at war with us, and merchants, who shall be treated as of above) to leave our Kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy - reserving always the allegiance due to us"

More significant were the nascent traces of the rule of law or legality set out by artible 39 of the Charter, that: "No freeman shall be taken or imprisoned or desseised or exiled or in any way destroyed, nor will we go upon him, nor send upon him, except by the lawful judgment of his peers or by the law of the land".

Nevertheless apart from the above-cited few provisions there is nothing which could justify one to associate the *Magna Carta* with the emancipation of the common man. However one has to understand its limitations on account of its coming at the height of the status-ridden Feudal system. It is for that reason that actually the Document was in force for only a few months, having been violated by none other than the King himself, although his successor King Henry III attempted to re-issue the same with variations in 1216, 1217 and 1225.[1]

Yet one cannot demean the historical significance of the *Magna Carta* to our subject of study, as the same was a result of the culmination of a long standing general dissatisfaction of the people of England with excessive powers of the absolutist monarch. Thus if anything, the *Magna Carta*'s importance is in the fact that it was a land-mark occurance in the history of the rights struggles of the people of England against personalised and oppressive political systems. This

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[1] See Gerald Murphy's statement at the end of the translated version of the *Magna Carta* by Nancy Troutman (The Cleveland Free-Net-aa 345) distributed by Cybercasting Services Division of the National Public Telecomputing Network, as was downloaded by this author from the CD-Roms in 'Constitutions of the Word.'

struggle against prerogative was reflected in a number of explicit statutory guarantees apart from the *Magna Carta.*[1]

Among the liberties proclaimed by these enactments, was the right to personal liberty and the freedom from unlawful detention or restriction of personal movement, of which remedy was much later expanded in the Habeas Corpus Act 1816.[2] In the same vein, was the right to freedom of conduct and liberty to do anything not expressly prohibited by law, and not likely to cause the breach of the peace or other disturbances.

Generally speaking the above-named instruments taken together with the United States' Bill of Rights of 1776 and the French Declaration of the Rights of Men of 1789, are undoubtedly documents of great historical significance and sanctity, as far as human rights are concerned. Although not all of them had the force of law,[3] they inspired reform in other countries, and have been held as valuable reference and take off points in the development and articulation of human rights. This leads us to the discussion of the doctrine of the rule of law, a concept which has since the 19th century come to engulf human rights and other liberal-democratic principles into a single constitutional legacy.

2.3. The Doctrine of the Rule of Law.

The modern form and content of the rule of law doctrine owes much to the ideas of the 19th century jurist Professor Albert Venn Dicey, then of the Oxford Vinerian Chair. According to him, the rule of law was a fundamental principle of the constitution with three meanings seen "from different points of view", namely:

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[1] Such as the Petition of Rights Act, 1627 (1627 3 Car. C. 1 s. 1), the Habeas Corpus Act, (1679 31 Car. III C. 2 S. 2), the Act of Settlement 1689 and the Bill of Rights Act of 1700 (1700 12 & 12 Will. C. 3 s. 2). See ibid: 587.

[2] 1816 56 Geo. III C. 100, s.2.

[3] Dicey describes these enactments as being "rather records of the existence of a right than statutes which confer it" See in Dicey, 1885: 203.

> "It means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government.
> .... It means, again, equality before the law, or the equal subjection of all classes to the ordinary law courts; the `rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals;
> .... The `rule of law', lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts."[1]

It is worth examining Dicey's significance, not only to modern constitutional law, but also to human rights and the making of institutions of governance in Tanzania Mainland. Thus it is important to note that Dicey included human rights in the third part of the above-quoted definition. In fact he dedicated three chapters to discussion of three specific rights namely, the right to personal freedom, the right to freedom of discussion and the right of public meeting.[2] It is argued in this work that these are still the cornerstones of the present-day constitutionalism, without which there cannot thrive democratic government in any country. This leads us to the discussion of the relevance of Dicey's doctrine to modern costitutional law.

2.3.1. Dicey's Rule of Law and Modern Constitutional Law.

One sees Dicey's strong belief in the working of the English unwritten constitution. On the one hand he is obsessed by the efficiency of the common law as administered by an independent Judiciary. On the other hand, one witnesses his extreme dislike of the French Administrative law. For that attitude, it has been acknowledged that Dicey was influenced by his own whiggist

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[1] Ibid: 198. See the modern definition of the Rule of Law in the Preface to the Journal of the *International Commission of Jurists* (1958) vol. 1, 153-156, thus: 'adherence to those institutions and procedures, not always identical, but broadly similar which experience and tradition in different countries of the world, often having themselves varying political structures and economic backgrounds have shown to be essential to protect the individual from arbitrary government and enable him to enjoy the dignity of man'.
[2] See ibid., Chapter Five at p. 202; Chapter Six at p. 233, and Chapter Seven at p. 266.

background added to his positivist cum empiricist philosophical approach.[1] According to McEldowney, "the concept of sovereignty he owed to Austin, the term "rule of law" to W.E. Hearn and his understanding of conventions to the work of the historian Edward A. Freeman."[2]

However, it is also important to consider the circumstances in which Dicey lived and wrote. This may explain the departure of some of his ideas from today's understanding of how government works. It should be noted of the major constitutional changes which had taken or took place immediately before or after the birth of Dicey, such as the Great Reform Act 1832, extension of parliamentary franchise in 1867, 1884 and 1918 which included:

> ".... The development of the political party system and a growth in government activity. Many economic and social changes were brought about by industrialisation, the concentration and mobility of the population, new transportation system and the progress of scientific discovery and economic growth."[3]

Apart from many other changes,[4] McEldowney has attempted to list some important laws of the period which substantially shaped government activity in a way we understand it today. Yet Dicey seems not to have acknowledged the growtrh of administrative law in England. He chose to emphasise the condemnation of arbitrariness in government, by insisting on the English constitution's capacity to deal with the problem, in comparison with the French *Droit Administratif.*

The above has been described as Dicey's tactical approach which had to do with his parental inheritance.[5] All the same, it has been concluded that, "at least from historical evidence, ...Dicey provides a good description of the constitution when he wrote", and that it is not right to "apply Dicey's principles to recent constitutional developments to test the validity of Dicey's analysis."[6]

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[1] See in Harden and Lewis, 1986: 3. Also, Dicey's positivist approach is obvious in Chapter One of Dicey, 1885 in his over-emphasis on the distinction between constitutional law in the real sense and the study of constitutional conventions.
[2] McEldowney, 1985: 40, refering to Arndt, 1957.
[3] Ibid.
[4] For the list of other changes mentioned, see ibid: 42-43.
[5] For Dicey's family and intellectual roots, see McEldowney's discussion in ibid: 44-46.
[6] Ibid.

By and large, the Dicean approach to constituional law is still entrenched in modern law and practice.[1] Thus Dicey's statement that no man is punishable except for a distinct breach of the law, established in the ordinary procedure before the ordinary courts, has been generally accepted as a standard against any system of government based on the exercise by persons in authority, or discretionary powers of constraints.[2] This way the doctrine of the Rule of law is made to go beyond ordinary boundaries of the principle of legality, thus assuming the role of guarding against arbitrary and unreasonable governance. How this is done by Tanzanian courts to give wider meaning to the Bill of Rights is analysed in Chapter Nine.

Moreover Dicey's concept of equality before law has come to fill one of the opening articles of written constitutions, and of all United Nations conventions in this regard. The rule of law has thus assumed a descriptive as well as a prescriptive function. It serves to chart out the system of liberal-democratic states, where the powers of state organs and officials are limited by law, in other words where government operates within law.[3] Whether the doctrine is capable of meeting the challenges of modern constitutional practice is discussed in the next section.

2.3.2. Constitutional Legitimacy and the Crisis of the Dicean Rule of Law Paradigm in the Later Part of the 20th Century.

One senses the crisis in the old notions of the rule of law doctrine by reading Dicey's critics. But the most general attack is the fact that constitutional law and theory built on the Dicean foundations, has "failed to come to terms either with embedded notions of constitutionality in a modern setting or with a descriptive account of the behaviour of constitutional actors".[4]

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[1] Harden and Lewis, 1986
[2] See Harvey, 1961:491
[3] Phillips, 1987.
[4] Harden and Lewis, 1986:5.

Such crisis is reflected in the contradiction that, whereas most of the present day constitutional law still embraces in theory the Dicean framework of the rule of law, in practice the latter does not live to the challenges of modern socio-political organisation.

Dicey's pillars of liberty and democracy, cannot in reality guarantee and meet the ideals they reflected a century ago. Writing on the decline of the old idea of parliamentary omnicompetence, which they describe as merely `axiomatic', Harden and Lewis conclude that ".... It is undisputed that the legislative assembly is incapable of managing the affairs of a modern welfare/capitalist state unaided".[1] The powers of Ministers in the law-making process as against those of elected Members of Parliament are cited as an example of Parliamentary lack of control.

On this aspect, McAuslan and McEldowney, having cited a number of illegitimate acts of both Labour and Conservative governments, take note that, "some specific action has been taken or planned to cut down on participation, on elections and on the institution of local government, the standard-bearer for greater participation in government".[2] And so they conclude about Ministerial responsibility in Britain, thus:

> "...Parliament exercises little if any effective control over the Executive, and that the principle of Ministerial responsibility is used not as a means of bringing Ministers to account before the House of Commons but a justification for not creating other and more effective means of accountability".[3]

It is these contradictions in the British Constitution which McAuslan and McEldowney have referred to as amounting to a "constitutional legitimacy crisis".[4] They have identified the issue of legitimacy as being "whether the government correctly exercises power and the arrangements

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[1] Ibid.
[2] Ibid: 20
[3] Ibid. On the concept of ministerial responsibility in England, see some recent commentary on the Scott Report in Lewis and Longley, 1996.
[4] McAuslan and McEldowney, 1985:1.

governing that exercise of the United Kingdom,"[1] emphasizing that, "the issue of legitimacy goes to the heart of any debate on constitutions and the exercise of power."[2] And what then is legitimacy?

The traditional definition of legitimacy, "....concentrated on the element of law or right and rested the force of a claim ... upon foundations external to and independent of a mere assertion or opinion of the claimant ... Thus a claim to political power is legitimate only when the claimant can invoke some source of authority beyond or above himself."[3]

Nevertheless the authors dismiss the existence of a satisfactory definition of legitimacy, but they substitute the same with the approach:

> "... which stresses that legitimacy revolves around the question of the right or title to rule but goes beyond mere legal rights or entitlements. These are, particularly in the United Kingdom which has no written constitution, issues of the ends of which power is used and issues of the ends of the means or procedures by which power is used".[4]

The concerns expressed by these authors about the constraints inherent in the British constitutional order, are relevant to our examination of the limitations faced by Tanzania in the current democratisation process discussed in Chapters Ten and Eleven. Undoubtedly in order for the doctrine to find some legitimacy in Third World countries like Tanzania, it must suffer modifications to accommodate the novelty of the situation.[5] Indeed for Tanzania, it is a long way back in 1885, when *The Introduction to the Study of the Law of the Constitution* was first published, the year the country assumed her colonial constitutional existence as German East Africa.[6]

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[1] Ibid: 30.
[2] Ibid.
[3] Ibid., citing Schaar, 1984:108.
[4] Ibid.
[5] See 'The Rule of Law in a Changing World', an Editorial of the *Journal of the International Commission of Jurists*, (1959) vol. II, I. Also see 'Contemporary Problems of the Rule of Law', and Editorial to the *Journal of the International Commission of Jurists*', (1959/60), No. 2,3 - 6.
[6] Reference here is made to the infamous Berlin Conference on the Partition of Africa, 1885.

In the early 1960s attempts were initiated to modernize and propose some remodelling of the Dicean rule of law framework to suit new circumstances, by the International Commission of Jurists.[1] The Commission has for the past three decades been organising conferences towards an institution of democratic legal regimes, particularly in the newly independent African states.

Of such meetings, the one held in Delhi in 1959, remains to be the most outstanding as far as the rule of law doctrine is concerned. In the Declaration of Delhi[2] the doctrine was given an interpretation that attempted to deal with the emerging strong executive governments of Africa. Reference was made in the document to "minimum material or substantive element in a legal system".[3] This saw the Rule of Law as implying and including, a right to a representative and responsible government; certain minimum standards or principles for the law and the principles contained in the Universal and European Conventions on human rights. Particularly, mentioned were; freedom of religious belief, assembly and association, and the absence of retroactive penal laws; the certainty of criminal law, the presumption of innocence, reasonable rules relating to arrest, accusation and detention pending trial, the giving of notice and provision for legal advice, public trial, right of appeal, and absence of inhuman treatment or punishments; and the independence of the judiciary.[4] Two years thereafter, the Delhi Declaration was affirmed in the context of Africa by the Commission's African Conference on the Rule of Law, which was held in Lagos, Nigeria on 3 - 7 January, 1961. It ended with the document called `The Law of Lagos`.[5]

This menu of rights has invariably been consulted by African countries engaged in the bill of rights-making process, and such bills resemble it. Nevertheless, the substance of the Delhi Declaration and The Law of Lagos, have not been short of critics, one of them being Phillips.[6] He

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[1] Non- governmental association of lawyers of the English- speaking world, with headquarters in Geneva Switzerland.
[2] See Phillips, 1987: 35. Deliberations of the Delhi Congress of January, 1959, which was attended by 185 judges and professors of law from 53 countries. See 'Rule of Law in the Changing world' supra.
[3] Ibid.
[4] Ibid.
[5] See 'From Delhi to Lagos', an Editorial to the *Journal of the International Commission of Jurists*, (1961), vol. III, No, I,3 -4.
[6] Ibid.

regards the Commission's views on the rule of law as stated above , as "sentiments" which were "confusing and misleading", and a "pervasion (sic) of the doctrine".

Disagreeing with Phillips, it cannot be denied that at least the declaration was an important milestone in the history of the concept in Africa. It paved way for the questioning of the legitimacy of applying the Rule of Law norms and procedures in their orthodox form, in the constitutional development of the newly independent African states. Yet one does not see much in the Commission's endeavours marking a depurture from the liberal-democratic paradigm of the Rule of Law docrtrine.

Thus for some Third World thinkers the rule of law doctrine is regarded in terms of its legitimation function, as Shivji puts it, that:

> ".... The quintessence of the "rule of law" is that the exercise of state power is neither arbitrary or widely discretionary nor exercised expediently, but rather state power is exercised in accordance with consentually (sic) arrived at principles and procedures, which are known in advance and that there are built in institutional mechanisms to question and seek remedies for breach of the said principles and procedures.... that the rule of law is not simply a composite concept and procedures of power but also an ideology through which the exercise of power is legitimated."[1]

Accordingly it is necessary that the powers of government must be approved and granted by Parliament within definable limits, which must be consistent with certain principles, for instance, with the principles of natural justice. Indeed in modern constitutional theory, the rule of law must be capable of checking "upon power, a limitation upon the arbitrariness of discretion as against the politicians' orientation for authoritarianism".[2] It means that the mere incorporation of the rule of law norms and procedures in a constitution does not suffice the requirements of modern constitutional law. And so the old formulation that any act of government which by the letter of the constitution is

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[1] Shivji, 1993:4
[2] Ibid.

sanctioned, is therefore constitutional, is now regarded to be a narrow sense of constitutionalism.[1] Thus Okoth Ogendo has coined the phrase "constitutions without constitutionalism",[2] to describe constitutions which do not entrench such principles as restraint, inquiry, remedy, accountability, openness, etc..

In Tanzania the above extended meaning of the rule of law has already assumed some judicial favour, in the High Court case of *Chamchua s/o Marwa v. Officer i/c of Musoma Prison and the Attorney General*, wherein Justice Mwalusanya stated as follows:

> "...I believe that the Rule of Law means more than acting in accordance with the law. The Rule of Law must also mean fairness of the government. Rule of law should extend to the examination of the contents of the laws to see whether the letter conforms with the ideal; and that the law does not give the government too much power. The rule of law requires that the government should be subject to the law rather than the law subject to government." [3]

This leads to the discussion of the independence of judiciary which forms part of Dicey's rule of law paradigm.

2.4. The Ideal of Independence of Judiciary.

It has been indicated above that apart from the supremacy of an elected Parliament, an independent judiciary administering the common law are the central aspects of the orthodox version of the Rule of Law. [4] According to Dicey, "the rules of law which form the constitution were not the source but the consequence of the rights of individuals as defined and enforced by the courts."[5] Besides that, this ideal is complemented by the doctrine of separation of powers, which was originally coined by a French philosopher Montesquieu. The latter simply requires that democratic

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[1] Nwabueze, 1973:301.
[2] Okoth Ogendo, 1991:9-34.
[3] Miscellaneous Criminal Cause No. 2 of 1988, High Court of Tanzania, Mwanza Registry- unreported. Hereinafter referred to as the *Chumchua Marwa* case.
[4] Harden and Lewis, 1986:37.
[5] Ibid

government should function through separate organs of state, that is, the Legislature, the Executive and the Judiciary.[1]

This view is still strong and influential of all common law oriented legal systems including Tanzania. It seems that Dicey's confidence in the independent judiciary as defender of individual rights against government excesses resulted from the absence of a written constitution in Britain. Yet his conviction about the abilities of an indepent tribunal has been inherited by many countries most of which have written constitutions.

All the same, the independence of the Judiciary norm has a long history going as far back as the Act of Settlement. Until then, judges in England had held office at the pleasure of the King who could dismiss them at will.[2] But by virtue of the above law judges in England could no longer be removed by the Executive but for misbehaviour, and only after both Houses of Parliament were addressed about it. The same applied to variation of their salaries. Subsequent Acts have substantially re-enacted such provisions.[3]

As for the Third World jurisdictions, it has been said about the Kenyan situation that a judiciary with the power to enforce constitutionally protected rights as against the state is essential to the continued existence of a healthy democracy.[4] According to Nowrjee, "at the heart of human rights and social stability in a constitutional system lies an independent judiciary."[5]

Furthermore, the International Commission of Jurists(ICJ), when considering the doctrine of the rule of law confirmed that:

> "The inevitability of human error especially when self interest comes in conflict with the claims of others, requires that law, and the assumptions which underline it, should be interpreted by a judiciary which is as far as possible independent of the executive and the legislature."[i]

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[1] See Wade and Bradley, 1987:47-59
[2] See ibid. Good examples are the Appellate Jurisdiction Act 1876, and The Supreme Court Act 1981.
[3] Kuria and Vazquez, 1991:147.
[4] Nowrjee, 1991.
[5] ICJ, 1959: 279-280.

The ICJ exposed the link between judicial independence and the belief that "Courts are ... the beacon of justice."[1] That such belief can "only be true as long as the judiciary is seen to be independent of other institutions or individuals."[2]

Thus it has been accepted that the independence of the judiciary ideal is essential to the rule of law, democracy and social stability. But saying that does not mean the same as establishing that in the countries espousing the ideal, there is real independence of the judiciary. Practice has shown that the Executive and Legislative arms of state do make use of various ways to undermine the independence of the judiciary. Such measures relate to and include appointments, removals and remuneration of judges; incorporation of ouster clauses in the body of the Constitution and other laws; establishment and over-reliance of quasi-judicial administrative tribunals or what have been described as `kangaroo courts' to adjudicate upon matters which are `sensitive' in the eyes of the Executive, and direct interference with the judicial process.[3]

In this Chapter, this work was concerned with tracing the Western origins of human rights norms as have been inherited in Africa, attempting to expose the meaning, scope and true characteristics thereof. It has been noted that human rights as part of the larger concept of the Rule of Law, were coined and developed to suit a general cultural and political requirements of their original home, in the different epochs in their history.

Furthermore it has been accepted that the adoption of the extended meaning of the rule of law, which is not limited to norms of positive law as entrenched in constitutions, but incorporates their socio-political inter-connections with the other institutions in public life, would meet the interests of Tanzania. That for these rules to be legitimate, they must be in consonance with the interests and aspirations of the people. Likewise for the institutions of government to be said to be operating in accordance with the rule of law, they must not only be so by virtue of the law, but be seen to conduct their business in a truly representative capacity by being directly accountable to the

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[1] Ibid.
[2] Ibid.
[3] See Nowrjee, 1991:9. On examples of judicial interference by the Tanzanian executive see Peter and Wambali, 1988. Refer also to the discussion in Chapter Twelve, infra.

people. The above principles are tested in Part Three of this thesis in the context of the recently introduced constitutional changes in Tanzania. The main issue to be resolved there will be whether movement from single to multi-party system of government without the necessary changes in the institutions of governance can guarantee public accountability of the leadership.

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[i] ICJ, 1959: 279-280.

CHAPTER THREE

From State Rights To Universally Enforceable Norms

Chapter Two charted out the Western origins of human rights. It was emphasised that the dominant human rights discourse is liberal-democratic. This chapter shows how through international law, this view has been universalised to the extent of establishing standards to be followed by all members of the world community. It is intended to provide only an overview for two reasons. First it is because of the expansiveness of the task, which for the economics of space, it cannot be given the treatment it deserves. Secondly, this thesis is focused on the study of human rights at a particular domestic plane. Thus the normative relevance of international human rights law on the Tanzanian Bill of Rights is highlighted. Specifically excluded, are the activities of the Non-Governmental Organisations in this regard.

3.1 The Genesis of International Human Rights Law.

The main body of international human rights law is a recent phenomenon. It has grown out of and simultaneously with the creation of the post - second World War international institutions. It is an effective development in international law reflecting, "the increased concern of people all over the world against the treatment of their fellow human beings in other countries, particularly when that treatment fails to come up with minimum standards of civilised behaviour." [1] The same was part of "man's struggle for the realisation of all his human values."[2] It is this strong concern for human

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[1] Robertson and Merrils, 1993: 1; Kanger, 1984: 1. See a different viewpoint in Starke, 1978: 113, who argues that it is not true to suppose that there is in existence a complete body of general and universal norms of international law binding member states to protect human rights under the Universal Declaration of Human Rights.
[2] Bhalla, 1991: 2.

suffering following the Nazi mass persecutions of innocent victims, and other similar acts of savagery against the human race, which led to the widespread and official use of the phrase `human rights'.[1]

The increased interdependence of the modern world "economically, strategically, culturally, politically and technologically - has made concern for human rights `a major international fact'."[2] It is a "revolution in international law", as protection of individual rights beyond nation states was unknown in traditional international law, which basically concerned itself with the relations between states,[3] a rule of law otherwise known as the dualist theory.[4] Another ancient principle which stood in the way of the smooth development of pre - 1945 international protection of human rights, was the doctrine of domestic jurisdiction of states over their subjects, which was presumed to be outside the ambit of international law.[5]

We can conclude that present day international human rights law arose out of the struggle of the Western nations against Nazism during the second world war, that having been a catalyst of the post - war initiatives towards that end.[6] However it is true that there were pre - 1945 human rights endeavours both at multilateral and interstate levels. One of such measures were the 19th Century arrangements through international treaties to suppress slavery.[7] Also worth mentioning was the development of international humanitarian law, by virtue of the Red Cross treaties.[8]

International humanitarian law had always operated as an expression of the equality of all human beings be them in whatever situation, one of the basic pillars of the present law on human rights. In fact because of the convergence of purpose and subject matter, in 1968 a process was commenced for the introduction of human right rules and standards into humanitarian law.[9] The

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[1] Starke, 1978: 118.
[2] Bhalla, 1991: 3, citing Moscowitz, 1958: 88.
[3] Robertson and Merrils, 1993; Mugerwa, 1968: 247 - 310; Bhalla, 1991: 5.
[4] Starke, 1978: 114; also Lauterpacht, 1947: 438 - 60, and 1948: 97 - 119.
[5] Brierly, 1963: 291. Reflected in art. 2 (7) of CUN.
[6] Kanger, 1984.
[7] Kanger, ibid: 11. Also Robertson and Merrils, 1993: 14
[8] Robertson and Merrils; 1993, ibid.
[9] Starke, 1978, referring to the Resolution of the International Conference on Human Rights at Teheran in 1968, calling upon the Secretary-General of the UN to study the better application of human rights standards to the law of war, and the necessity of additional conventions to supplement the Geneva Conventions of 1949."

above initiatives led to this branch of law which until then was called `law of war' or `law of armed conflict', to assume the present name of `humanitarian law'. This also indicates awareness amongst the international community of the fact that "respect for human rights cannot be fragmented into time of peace and war and that such rights are under maximum threat in time of war." At the present time, humanitarian law is "essentially complementary to the human rights regime."[1] Moreover the two 1977 Protocols resulting from the Swiss government - organised Diplomatic Conference on the Reaffirmation and the Development of International Humanitarian Law Applicable in Armed Conflicts, have re-confirmed the closeness of these branches of international law.[2]

The other pre-war concern for human rights related to the protection of minority rights. Following the end of the First World War and the redrawing of frontiers in Central Europe after the Peace Agreement of 1919,[3] a mixture of nationalities within national borders became the order of the day, with obvious negative consequences on minority communities. Arrangements in international instruments were made providing for legal protection. This marked the beginning of a shift in international law from its dealing solely with states to concerning itself with individuals, which was completed by the direct involvement of the United Nations in this regard. There were other pre-1945 international programmes after the First World War which dealt with human rights, which cannot be discussed here for lack of space.[4]

The above exposition implies that when the original members of the UN were sitting at San Francisco in 1945, there was an advanced practice of international protection of human rights. This explains their overwhelming concern for the atrocities committed against the human race, and for their unequivocal call for a system of international norms for the protection of human rights[5]. This led three years thereafter to the adoption of the Universal Declaration of Human Rights.

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[1] Ibid: 130 - 131.
[2] Robertson and Merrils, 1993: 270.
[3] This involved; (i) the restoration of Poland; and (ii) creation of successor states after the dissolution of the Austro-Hungarian Empire. See ibid: 19. For a background account see Marcartney, 1934.
[4] See Green, 1958: 648; Kanger, 1984: 11 - 12; Starke, 1973: 115; Jenks, 1960; Hall, 1948; Zimmern, 1936.
[5] Imposing an obligation on each nation to respect the human rights of its citizens, and that other nations and the international community have a right and responsiblity to protest if this obligation is not met. See Maluwa, 1997: 6

3.2. The History of the International Bill of Rights.

The founding fathers of the United Nations did not mince words about their commitment to human rights.[1] They reaffirmed "faith in fundamental rights, in the dignity and worth of the human person in equal rights of men and women...", in the first lines of the Preamble to the Charter of the United Nations.[2] Apart from that, it is one of the purposes of the United Nations, "to achieve international co-operation... in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." (art. 1) This implied "a widespread conviction that the effective international protection of fundamental human rights was a major purpose of the war inasmuch as it is an essential condition of international peace and progress."[3]

Furthermore the United Nations General Assembly (UNGA) is given an obligation to "initiate studies and make recommendations for the purpose of *inter alia*, promoting international co-operation... in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language and religion." (art. 13) Moreover the UN is also made obliged to promote among others, *universal* respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex , language or religion."[4] And to concretise the universal commitment to human rights, "all members pledge themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55". (art. 56)

Not only that, to make sure that the above-mentioned commitment translated itself in deeds, the Economic and Social council (ECOSOC), an organ of the UN as composed by Article 61, was given as one of its functions and powers, to "make recommendations for the purpose of promoting

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[1] Starke, 1973: 119, has referred us to among others, the Dumbarton Oaks Proposals of 1944 which were a prelude to the San Francisco Conference for the establishment of the United Nations Organisation of June 1945 and the Yalta Voting Formula. It was thereby stated that the proposed organisation was to "facilitate solutions of international, economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms."
[2] Appendix I of Harris, 1983: 748.
[3] Bhalla, 1991: 3.
[4] Art. 55. Added emphasis on the word 'universal'

respect for, and observance of, human rights and fundamental freedoms for all. (art. 62) Thus the ECOSOC was to "set up commissions in economic and social fields and for the promotion of human rights...." (art. 68) Besides the ECOSOC, another organ of the UN, the International Trusteeship System established by Article 76, had as one of its purposes, "to encourage respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion, and to encourage recognition of the inter-dependence of the peoples of the world...." We shall return to this system in Chapter Seven in relation to how the same operated in colonial Tanganyika under the British. It may be concluded that the Charter provisions discussed above, are general statements of principles and commitments of the UN, which were intended for future definition in a more comprehensive and specialised international document, that is the Universal Declaration of Human Rights of 1948.

Strong language is noted in the Charter by the use of the word `shall' in Articles 13, 55, 66, 68 and 76, indicating the level of international commitment to human rights. What was done was to project "the burdens of the organisation, designate(s) the instrumentalities, and list(s) the methods to make real the pledges relating to human rights and fundamental freedoms contained therein, [setting] out the obligations which Member Nations assume in this respect".[1] Nevertheless the goals intended, that is, promotion, encouraging, assisting in the realisation, initiation of studies and recommendations etc., do not reflect a vigorous programme. This could be explained by the variety of cultures involved and thus disparity of attitudes towards human rights within the international community. It is the concern for this, coupled with a strong desire for a common ground, which turned the programme into some political commitment to human rights protection.[2] It seems that the main goal of the Charter, was not a clear-cut development of binding norms of international law, but to set out some peace-oriented objectives in the protection of human rights.[3] In that sense the Charter provisions are a politically weakened regime of law.[4]

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[1] Bhalla, 1991: 10.
[2] Starke, 1973: 121.
[3] Bhalla, 1991: 6, quoting from US President Truman's closing speech at San Francisco, thus; "The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain these objectives for all men and women everywhere - without regard to race, language or religion - we cannot have permanent peace and security."
[4] Starke, 1973: 121.

Thus sceptics have not been keen about the binding nature of the Charter in the field of human rights, claiming that the Member States "merely agreed to promote international co-operation to that end."[1] But this position is challenged by some international law authorities."[2] However taking into account the complexities involved in international relations, one cannot demean the contribution of the United Nations Charter in this area, as "for the first time an international organisation had assumed a responsibility for the promotion of human rights."[3] This implied removal of human rights, "from the sphere of the reserved jurisdiction of a state over its own nationals to make it a matter of international concern."[4] Indeed, it transformed "the notion of human rights and fundamental freedoms into a principal norm of international law."[5]

By the way, "the Charter is not only a treaty embodying maximum limitations on States' freedom of action that nations at that stage of history were prepared to accept as consistent with their normal interests, but also a constitutional document setting forth guidelines for future development."[6] Therefore, the intention of its founding fathers having been the establishment of an international organisation capable of maintaining international peace and security, it is off-point to demand of a definition and inclusion of implementation measures in this document. Anyhow this omission was cured by the priority the UN gave to the drafting and ultimately adoption of the Universal Declaration of Human Rights.

Acting under Article 13 of the Charter, the UNGA during its First Session of December 1946, resolved to transfer the question of the drafting of an International Bill of Rights to a commission established in accordance with the Charter.[7] It is worth noting in this regard the absence of the interests of the main developing countries, particularly Africans who were still living under the yoke of colonialism. This explains the scepticism often expressed as regards the relevance of human

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[1] Ibid. Also Bhalla, 1991: 11 - 12, mentions among others, Hudson, 1948: 105 - 107.
[2] The most prominent among them being Leuterpacht, 1950: 79, insisting on the legal duty of Members to respect and observe fundamental rights and freedoms on the basis of the Charter provisions; also McDougal, 1949: 496.
[3] Kanger, 1984: 15.
[4] Starke, 1973: 121.
[5] Bhalla, 1991: 10. Also Simma, 1995.
[6] Ibid., relying on Goodrich, 1969: 10.
[7] Kanger, 1984: 16, relying on Cassin, 1951: 241 - 365.

rights norms to the Continent, as had been received via the Universal Declaration of Human Rights and other forces of international hegemony[1].

3.3. The Influences Behind the Drafting Process of the Universal Declaration of Human Rights 1948.

Much has been written on the Declaration's drafting process as is evidenced by seminal literature.[2] This work does not concern itself with most of the above. Nevertheless it should be noted that when the United Nations Commission on Human Rights set out to the task of drafting the Declaration, a well-grounded framework of the subject matter of their mission was in stock only for them to tap from. The influence of the allied powers as led by the USA and Great Britain cannot be ignored,[3] although the negligible presence of some countries of the Third World and the Socialist Block in the Drafting Committee did not rule out ideological conflicts.[4] And thus after a long, tiring and sometimes controversial drafting process, also involving the ECOSOC, the Third Committee,[5] and even some Western NGOs and private individuals and institutions, on 10 December 1948, the Declaration was ultimately adopted by the UNGA. It passed with no vote against and only 8 abstentions, including Saudi Arabia, South Africa and the then 6 communist countries.[6]

However one notes the following aspects in accounts about the drafting of the Declaration. First is the confirmation of the Western liberal-democratic framework of human rights, although for the first time in history, there was a direct recognition of what later came to be known as economic, social and cultural rights[7]. The latter followed the contribution of the main socialist countries in the process.

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[1] See infra, Chapter Five.
[2] See for example Cassin, 1951, Green, 1958, Lauterpacht, 1950, Robinson, 1958 and ERCOP, 1968.
[3] Sohn, 1995.
[4] Hampreys, 1973: 22 - 27; Kanger, 1984: 16.
[5] 81 long meetings, 68 resolutions with amendments . See ibid.
[6] Hamphreys, 1973: 27.
[7] See infra, Chapter Four.

Secondly is the fact that the drafting of the Declaration heavily relied on a variety of domestic legal regimes.[1] This tells the inter-connection between international human rights law with the relevant domestic laws at normative level. While the collection of instances of the latter forms the basis for the former on the one hand, on the other hand, the former operates as a collection of standard norms for the guidance of the latter.[2]

3.4. Tripartite Notion of the International Bill of Rights and Other Features of the UN Declaration.

From the beginning of the drafting process, the Commission made a decision, that the phrase 'international bill of rights' would have three implications.[3] That first it would include a declaration of human rights, secondly be a convention of human rights, and thirdly impose measures of implementation. Indeed the quick adoption of the Universal Declaration of Human Rights in 1948, was the implementation of the Commission's first theme. Moreover it has been claimed that the text of the Declaration was a well-drafted document although it included "some articles which do not enunciate justifiable rights"[4] Omissions have been noted, including the absence of any mention about the protection of minorities.[5] According to Humphreys, non-recognition of the right of petition even at national level is a fundamental omission.[6] But this is demanding too much of the Declaration which as was noted by one of its founding fathers Charles Malik was basically aimed at "defining in succinct terms the fundamental rights of man," in order to "exert a potent doctrinal and moral educational influence."[7] Indeed, these objectives have nothing to do with enforcement measures which Professor Humphreys desires to associate with the Declaration, without taking into account the tripartite notion of the whole project.

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[1] Bhalla, 1991: 7, calls this a "process of transformation from costitutionalization to internationalization of human rights."
[2] International human rights law can only be effective in practice if each nation makes these rules part of its own domestic legal system, for example through entrenchment in the national constitution. See Maluwa, 1997: 58.
[3] Kanger, 1984: 16 - 17; Malik, 1980: 10f and Humpreys, 1973: 22, who says that the decision was made during the Second Session.
[4] Humphreys, 1973: 27.
[5] Ibid. Also Humphreys, 1968.
[6] Ibid.
[7] Kanger, 1984: 16 - 17, referring to Malik, 1980.

It has also been claimed in relation to article 29 of the Declaration, the lack of a catalogue and definition of duties which are correlative to the provided human rights. Actually the article is seen as a legitimate limitation of the human rights so allowed.[1] The article stipulates that everyone owes duties to the community, and this is seen as being too general. However article 29 could be seen as an innovation departing from the traditional Western liberal-democratic paradigm dominant in the Declaration. The same should be held as another impact of socialist countries. Yet it is important to intimate here that this innovation did subsequently get adopted by the African Charter and later the Tanzanian Bill of Rights, for different reasons to be discussed in Chapters Five and Nine.

Otherwise, the main body of the Declaration has three main features.[2] In the first 21 articles, it provides for traditional civil and political rights. Secondly there is one umbrella article. And thirdly there follows a list of definitions of economic, social and cultural rights. Indeed, the mere fact that these latter rights were defined in spite of the dominance of the Western democracies in the drafting process, makes the Declaration to deserve the respect of being the most sacrosanct document in this field of study. It was actually the most important landmark in the long history and development of a wide range of norms of international human rights law. In the case of Africa it actually inspired the decolonisation of the Continent by the early 1960s.[3]

This section of the chapter has been establishing that the real foundation of the present international human rights law are the UN Charter and the Universal Declaration of Human Rights 1948. [4] It has been shown that although there were some disputes amongst the founding fathers of the United Nations on the actual content and form of human rights, there was a general consensus in 1945 about the necessity of establishing a reliable system of the global protection of human rights, to avoid the recurrence of the bloody atrocities of the second World War.

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[1] Humphreys, 1973: 27.
[2] Ibid.
[3] Ref. UNGA, 1960, adopted by 89 votes to 0, with Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, UK and USA abstaining. See Harris, 1983:95.
[4] However the main sources of the international human rights law are first conventional international law, and secondly, customary international law. See Maluwa, 1997:60

There may still be controversy about the binding nature of the Declaration, but there is evidence that the same has invariably been utilised by the international community in arriving at "binding decisions on important international issues, whether by relying on it, or otherwise by direct application of its provisions at least as part of customary international law.[1] Since 1948, progress has been achieved in this regard. In 1966, deriving from the Declaration, two Covenants on human rights were made a reality. It is intended to deal with them in the next chapter. But this chapter concludes with a focus on Tanzania's response to the regime analysed above.

3.5. Tanzania and the International Law Regime.

In this part of the thesis it is intended to demonstrate how Tanzania, as a member of the international community, has adapted to the development of human rights at that level. As shown above, it is argued that the dominant human rights view has found its way and is prominent in the Tanzanian law. The United Republic of Tanzania is a member of the United Nations since 28 April 1964 as a union of two former sovereign states, Tanganyika and Zanzibar, which on their part had joined the World Organisation on 9 December 1961 and 22 January 1964 respectively. Tanzania does not have a bad record as far as ratification of major human rights conventions is concerned as is shown by Appendix IV.

From Appendix IV, one sees that of the 19 major international human rights conventions and protocols, Tanzania has ratified 15 or 79 per cent, an impressive record by any standards. But this does not mean anything beyond explaining *prima facie* readiness and willingness towards international obligations in this respect. Such willingness may not contribute much towards the promotion and protection of human rights within the borders of the country, if the same is done for the sake of good international public relations. Indeed Tanzania can be described as one of those

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[1] On the binding nature of the Declaration see; Robinson, 1948: 41 - 43; Schwelb, 1959: 217 et seq.; Mugerwa, 1968: 139, 249; D'Amato, 1971; Thirlway, 1972: 99 et seq.; Kanger, 1984: 28 - 32. For a contrary view see Leuterpatcht, 1950: 397. For a list of Resolutions relying on the Declaration see Humphreys, 1973: 34 et seq.

countries not keen on being bound by obligations of the international instruments she has ratified. This will become clear in the discussion in Chapter Nine on the main features of the Bill of Rights.

Also one may question Tanzania's continuing refusal to ratify some international instruments central to the implementation of human rights. For example, it makes little sense to a country's membership of the regime under the International Covenant on Civil and Political Rights , if the same refrains as Tanzania continues to do, from ratifying the First Protocol. The same allows submission of individual petitions before the Human Rights Committee.[1] Our request for interview questioning about Tanzania's non-ratification of some of these instruments from the relevant Ministry, was not responded to presumably on account of the unfortunate code of state secrecy. But one can conclude that the country's failure to allow such petitions has a bearing on the ruling regime's negative attitude towards the justiciability and enforcement of human rights even at the domestic plane, as we shall show in Chapters Ten and Eleven.

Tanzania has chosen to lag behind African countries such as Angola, Benin, Cameroon, Central African Republic, Congo, Gambia, Madagascar, Mauritius, Niger, Senegal, Seychelles, Somali, Togo, Democratic Republic of the Congo (Zaire) and Zambia, which have joined the Protocol procedure. This is despite her positive reputation particularly in the refugees sector and long-time support of the Southern African liberation struggles. There is nothing special in these countries except the positive political will of the governments concerned. In fact some of them, like Angola, Central African Republic, Somalia and the Democratic Republic of the Congo (Zaire) have had in the past bleak and agonising periods of large-scale human rights violations the scale of which remains unknown in Tanzania's history. Moreover some countries like Congo and Zambia have had experiences of one-party regimes similar to which existed in Tanzania, and yet the two have managed with the procedure of individual petitions from as far back as 5 January 1984 and 10 July 1984 respectively.[2] Indeed, relying on the experiences of the above-mentioned African countries, the

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[1] Infra, Chapter Four.
[2] See HRC, 1992: 170 - 1, Appendix 1C.

argument that to ratify the First Optional Protocol might open floodgates of individual petitions to the detriment of the state coffers and basic political interests,[1] cannot hold water any longer.

One could also presume the reason for the non-ratification of the Second Protocol dealing with the abolition of the death penalty, and the related Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It should be based on the government's support of the death penalty.[2]

As to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage,[3] the omission cannot have any basis. This is in view of the fact that the Tanzanian Law of Marriage Act 1971,[4] does clearly conform with the main provisions thereof dealing with the requirement in the instance of marriage, of consent, (art. 1) minimum age (art. 2) and official registration. (art. 3)

The next chapter analyses the effectiveness of the system of implementation measures under the UN Covenants. It then discusses Tanzania's submission of her first periodic report to the Human Rights Committee exploring how this might have influenced the decision to adopt the Bill of the Rights.

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[1] The position of the government revealed by a source in the Ministry of Foreign Affairs preferring anonymity.
[2] See Court of Appeal decision in *Mbushuu @ Mraoje and Another v. The Republic*, Criminal Appeal No. 142 of 1994, supporting the government's position on the basis of among others, the fact that the death penalty is also tolerated by international law.
[3] UNGA, 1964.
[4] Act No. 12 of 1971.

CHAPTER FOUR

Systems Of Implementation Measures And its Impact On Tanzania

This chapter explains how the system of implementation measures works under the two 1966 United Nations Covenants on Human Rights. The analysis shows how effective the globalised system of human rights protection has been and its capacity to coerce the submission to it of the economically weak countries like Tanzania. The point to be made is that whereas it has been possible for the economic giants like the United States to ignore the existence of the International Covenant on Social and Economic Rights, the same has not been true of countries which are the net recipients of economic aid. The latter under the constant threat of international reprisals in the form of economic seclusion have half-heartedly acceded to the Covenant system.

It has already been stated above, of the decision on the tripartite formulation of the International Bill of Rights, whereby the second phase was to involve a convention comprising directly binding rules of international law.[1] It was thus decided by the UNGA in addition to the December 1948 Resolution adopting the Universal Declaration of Human Rights, that work should proceed on the other parts of the International Bill of Rights.

It took about sixteen years of rigorous and unprecedented activity of multilateral treaty making to complete the drafting process. The same involved, as a result of the late 1950s' intensification of the Cold War, the necessary tug of war between the West and the East, particularly as related to the inclusion of economic and social rights, and over the nature and extent of implementation measures.[2]

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1 ECOSOC, 1949.

2 See Sohn, 1968: 101-6, as to the change by the Commission on Human Rights in December 1947, of the name "convention" to "covenant on Human Rights" and other proceedings and controversies, also, Roberson and Merrils, 1993:28-34, both

4.1 The Human Rights Protection Regime under the International charter on Civil and Political Rights 1966

The International Covenant on Civil and Political Rights was adopted by the UNGA on 19 December, 1966.[1] It came into force on 23 March 1976, after the date of deposit with the Secretary-General of the United Nations, of the 35th instrument of ratification or accession, in accordance with article 49(1) thereof.[2] Several instruments of ratification of the 35 States were accompanied by reservations about which the Covenant was silent.[3]

Out of the 35, there were 6 countries from Western Europe. But notable was the overwhelming rate of ratification from Eastern European Socialist States, which were generally considered to have a poor human rights record. There were 8 such entries from that group of countries, including all the three Soviet Members of the United Nations; that is about 80 per cent of all the states in that Block,[4] only 2 of them not having acceded.[5] This may be explained by the world community having accepted the inclusion of the economic, social and cultural rights, the cherished priority concerns under the ideals and philosophical orientation of socialism. The force of this argument is supported by the absence in the list of the first Member States, of the United States of America,[6] undoubtedly because of the negative position she took in the Third Committee of the General Assembly on the worth of these rights.

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generally relying on CHR, 1947: 3,6, CHR, 1947a, 5,24-30, CHR, 1950: 26-28, UNGA, 1950: 42-43, UNGA, 1952, UNGA, 1952a and CHR, 1954:67-72.

1 See UNTS, 1976: 171 for the authentic text of the covenant.

2 Ibid.

3 See Ibid.

4 There were 10 Member States of the UN from the Eastern European Block by 31 September 1982, according to Harris, 1983:781, Appendix II.

5 Albania and Poland.

6 The USA acceded recently on 8 June 1992 only to the International Covenant on Civil and Political Rights, and is still refraining from the other.

As for Africa, 5 countries out of 50,[1] only 10 per cent, was not an encouraging rate. It is another illustration of the reluctance of the fragile and highly centralised and autocratic regimes of Africa, to accept the positive advantages of human rights. This was in spite of the said governments' human rights rhetoric invariable expressed within the United Nation's institutions, and other international fora. Nevertheless, over the years the rate of African ratification has gradually increased, as is shown by Table 4.1 below:

TABLE 4.1 The Rate of African Ratification or Accessions to the International Covenant on Civil and Political Rights 1966, for the Period Between 1977 and 1992 In Five Year Periods

By the Year	Total No. of Ratification	Ratification from Africa	African Rates as % of Total	Increase in Nos.	Increase in Percentage
1977	44	9	20.5	N/A	N/A
1982	70	12	17.5	3	25
1987	86	22	25.6	10	45.5
1992	112	29	25.8	7	24.1

SOURCE: Reports of the Human Rights Committee to the UNGA for the years 1977, 1982, 1987 and 1992.

Table 4.1 shows a growing interest of African countries in the international regime. That from being a mere 14.2 per cent of the 35 Member States at the occasion of its coming into force, the number has increased from the original 5 to 29 by 31 July 1992, which is 25.8 per cent of the 1992 total of 112, that is about half of all the African States members of the United Nations. Nevertheless, it is worth noticing that whereas the rate of increase was reasonably high in the five years between 1982 and 1987, it has sharply decreased during the period between 1987 and 1992 almost by half, from 45.5 per cent to only 24.1 percent respectively. The question is whether this is an illustration of a growing eclipse of

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[1] See Harris, 1983:781. The number excludes The Republic of South Africa.

African interest in the system in recent years, and if so why. It is the position herein that during this era of economic, social and political liberalisation in Africa, the continent cannot afford to express, and even articulate a disinterest in the international system of human rights protection.

However the above could possibly be explained by the coming into force of the African Human and Peoples Rights Charter in 1986. For most African countries which had hitherto been reluctant to join the Covenant system, it became convenient to accede to the regional arrangement. This was so not only because of proximity, but more important, because of the capability under the new Charter, of individual States, to manipulate the system through the parent political organisation, the Organisation of African Unity (OAU). It should be noted that, whereas the international human rights watchdog, the Human Rights Committee is an independent institution, its counterpart the African Human Rights Commission is not so, as will be shown in the next chapter.

4.2 The Human Rights Committee as the Organ of Implementation

The existence of an effective system of implementation measures is what brings value to any international statute. It is therefore not surprising that international concern for human rights protection has been consistently directed towards the procurement of effective measures of implementation. There has always been consensus on this, the only controversial issue being the extent of the effectiveness of such measures.

During the early days of the conceptualisation of the International Bill of Rights, the Commission on Human Rights failed to strike a clear cut agreement as to what measures of implementation to adopt, in spite of there being presented various proposals to that effect.[1] Ultimately it is said,[2] that the Commission went on to vote in favour of the establishment of a permanent Human Rights Committee, "to consider complaints of violations of human

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1 Robertson and Merrils, 1993:28

2 Sohn, 1968:143-4, 161.

rights on an inter-state basis,[1] rejecting a strongly argued proposal for availability of petitions by individuals and NGOs.[2] Undoubtedly, this was a great breakthrough against the hitherto scaring controversy as to the effect of article 2(7) of the Charter of the UN, providing for the sanctity of the domestic jurisdiction of Member States in the way they treated their nationals within their borders.

4.2.1. The Membership of the Human Rights Committee

The United Nations Human Rights Committee is established by article 28(1) of the International Covenant on Civil and Political Rights, [3] as the principal organ of implementation of civil and political rights. It is supposed to comprise 18 members (art.28(1)). Such members must be nationals of State Parties thereto, with "high moral character and recognised competence in the field of human rights" (art.28(2)). The same provision adds a non-mandatory qualification for election, "the usefulness of the participation of some persons having legal experience, but not necessarily judicial practice as was provided for by an earlier draft of the Covenant in 1954.[4] Apart from that, such members are to be elected, and have to serve the Committee in their personal capacities (art.28(3)).

Thus the initial meeting of State Parties for the purposes of electing a new committee, was convened by the Secretary-General six months "after the date of the entry into force of the Covenant," (art.30(3)) that is, on 20 September 1976.[5] By then there were 44 States Parties to the Covenant including Tanzania,[6] who met at the UN Headquarters in

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1 Ibid, 7 votes for, 6 against and 1 abstention.
2 Sohn, 1968:161.
3 See text in Brownlie (ed), 1995: 128, 137.
4 Robertson and Merrils, 1993:37
5 HRC, 1977:1, para 1.
6 Tanzania ratified the Covenant on 11 June 1976, and the same entered into force in respect of Her on 11 November 1976.

New York, having satisfied the two thirds quorum (art.30(4)). The 18 members so elected,[1] generally reflected some "equitable geographical distribution," and the "different forms of civilisation as well as the principal legal systems" (art.31(2)). There were 5 from capitalist Western Europe, 4 from socialist Eastern Europe, 2 from Asia, 1 from North America, 3 from capitalist Latin America and 3 from Africa.[2]

The regular term of four years commenced on 1 January 1977, but 9 members were to have a two year term, and these were chosen by the Chair of the Session by lot, on the letter of article 32(1) of the Covenant, which also provides for eligibility for re-election if re-nominated (art.29(3)).

4.2.2. The Reporting System

One significant feature of most implementation measures enshrined in various post-war II multilateral instruments, is an obligation invariably imposed on member States, to report to some central international authority. The Covenant has provided the Committee with two major measures of implementation. The first is the obligation under article 40 of the Covenant, of the State parties to submit reports, "on the measures they have adopted which give effect... and the progress made in the enjoyment of the rights recognised by the statute"[3] The second is the inter-State procedure recognised by article 41 of the Covenant. A point deserving emphasis here, is the fact that whereas the former is compulsory, the latter procedure is optional.

This makes the reporting system the principal measure of implementation and the Committee has over the years successfully managed to impose its will and standards. Yet

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1 HRC 1977:2 para 2.

2 Robertson and Merrils, 1993:38.

3 By virtue of article 40(1)(a) and (b), reports must be submitted within one year of the coming into force of the Covenant for the member State concerned, and thereafter whenever the Committee so requests.

this measure has not escaped criticism, on account of probable unlikelihood of impartial reporting because of the involvement of government officials of the concerned States. But it has been argued in defence of the system, that what matters are not the contents of the report as submitted, but how the same is dealt with by the Committee subsequent to its receipt.[1]

With that kind of criticism in mind, various options were considered when the Committee sat to make rule 66 of its Provisional Rules of Procedure.[2] Thus it was drafted in a way that invited detailed account of the situation, in the process of which the author state would be compelled to spit out some grains of truth, however cushioned the statement might be. Moreover, the Committee is empowered to determine "the dates by which such reports shall be submitted," (rule, 66(2)) and that the same should be indicated in the request sent to the particular member State. The question which follows is whether member States have felt bound by the periods of submission as invariably set by the Committee, and this can be answered by Table 4.2 below.

TABLE 4.2: The Rate of Default in the Submission of Initial Reports on Dates Due by Member States of the International Covenant on Civil and Political Rights under Article 40 Thereof from 1977 to 1992 in Five Year Periods.

By the Year	No. of Member State	Membership Increase by %	No.of Defaulting States	Defaulting States as % of Total
1977	44	N/A	27	61.4
1982	70	37.1	8	11.4
1987	86	18.6	12	14
1992	112	23.2	5	4.5

SOURCE: Reports of the Human Rights Committee for the Years 1977, 1982, 1987 and 1992

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1 Robertson and Merrils, 1993:41.

2 See HRC, 1977.

Table 4.2 provides an encouraging picture, as far as the States parties' submission of initial reports to the Human Rights Committee, is concerned. Whereas in the first five years of the operation of the Committee, member States to the Covenant increased by 37.1 per cent, only 11.4 per cent thereof had not submitted their initial reports by July 1982, a significant improvement from the 61.4 per cent in 1977, the initial year. And although the percentage of defaulting member States rose to 14 in 1987, by 1992 the same had gone down to a mere 4.5, in fact 5 out of the then 112 member States. By any standards, this is a success story, as far as the reporting system is concerned.

However these results have not fallen from heaven like the Biblical manna. The Committee does invariably apply its compelling powers, including the sending of reminders,[1] and citing the name of the defaulting State party in its Annual Report to the UNGA (rule 69(1) & (2)).

Besides that, the requirement that States parties should attend Committee sessions during which their reports are being considered, is an effective aspect of the system (rule 68). This enables the Committee to check the veracity of the contents of States parties' reports, by some sort of cross-examination of the concerned State delegates involved in the presentation. In the process the submission of additional information may be required.[2]

In some occurrences reports may be compared with other sources of information, to confirm their credibility before the relevant session during which they are dealt with.[3] This procedure has over years borne positive results. Another method used by the Committee to ensure effectiveness of the reporting system, is the formation of guidelines as to the form and content of reports, which they did during the second Session of 1977.[4]

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1 Rule 69(1) of the Committee's Provisional Rules of Procedure. See ibid for full text.

2 See HRC, 1977:10, para 59 and HRC, 1981 para 34.

3 Robertson and Merrils, 1993:41.

4 For the full text of the Guidelines see HRC, 1977, Annex IV.

And lastly on the reporting system, is the question of the effect of recommendations of the Committee to States parties. The Human Rights committee can only give "such general comments as it may consider appropriate.[1] The same lack the binding force of the Resolutions of the UN Security Council, or the UNGA.

Although the Covenant is binding law on its States parties, the *modus operandi* involved does not suggest so.[2] Instead what goes on is a process of continuing dialogue between the Committee and States parties for the attainment of maximum compliance with the Covenant. On this too the reporting system bears some credit.

For the purposes of this work, we do not intend to discuss in detail the inter-State implementation measures provided for in article 41 of the Covenant. The same do not seem to have any normative significance on the relevant constitutional provisions in Tanzania Mainland, our case study. But briefly stated, the same involves some bilateral arrangements between States for *ad-hoc* concilliation commissions.[3] We should now move to the discussion on the Optional Protocol.

4.2.4. Individual Communications under the First Optional Protocol

The first Optional Protocol[4] was adopted and opened for signature with her mother statute, the International Covenant on Civil and Political Rights, as has already been stated above. This is a separate international instrument, providing for another important measure of implementation of the Covenant. It provides for the right of individuals to complain

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1 Article 40(4) of UNGA 1966.

2 Robertson and Merrils, 1993:48 noted two schools of thought on this issue. One advocates for a much stronger Committee, capable of preparing "a report on each national report, thus monitoring each party's compliance and making appropriate recommendations to the state concerned." Another does not see the role of the Committee as passing judgment on States but merely assisting "States in promoting human rights ..."

3 Article 41 of the Covenant entered into force on 28 March 1979 when 10 States parties to the Covenant made declarations under para (1) thereof. See Hemalengwa, 1988:183.

4 Text of the first Optional Protocol to the International Covenant on Civil and Political Rights 1966, in Brownlie, 1995:146-149.

about alleged violations, one achievement of the UN efforts in this regard.[1] In fact it gives competence to the Human Rights Committee, "to receive and consider, ... communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant."[2] Significantly this procedure was not included within the Covenant in order to make it optional.[3] Such compromise as emanated from the complex negotiations involved is yet another illustration of the impact of article 2(7) of the UN Charter.

It is the duty of the Secretary-General of the UN to receive communications in the first instance, but has to bring those which qualify to the immediate attention of the Committee (rule 78(1)). However it should be noted that the role of the Secretary-General is strictly administrative. This distinction of roles is important to ensure the Committee's independence and freedom of opinion. Moreover there is in place a criteria for the admissibility of individual communications.[4] The same emphasises that the presentation of a communication should be done by only a named individual who has been victim, and complains about a violation by his own State which is party to the Protocol, "of the rights set forth in the Covenant" (rule 90(10)(b).

Furthermore, the determination of the merits of a communication may only commence if the same having previously been declared to be admissible, is submitted together with the decision to the State party concerned, while also informing the author thereof about the same (rule 93(1)). On the basis of written information, both from the accused State and the individual victim, the Committee may finally determine the matter in dispute by forming its views thereon (rule 94(1)). The Committee's views have to be communicated "through the Secretary-General of the UN, to the individual and the State party concerned.[5] However Members are allowed to request that their individual opinions "be appended to the views of the Committee when they are communicated to the individual

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1 Schmidt, 1992:645.

2 See the Preamble to the First Protocol to the International Covenant on Civil and Political Rights, 1966.

3 Article 1 of the Optional Protocol, ibid, and Rule 78(3) of the Provisional Rules of Procedure of the Human Rights Committee.

4 See HRC, 1977:10-12, paras 52-62 as relates to articles 3 and 5 of the First Optional Protocol and Rules 90, 93 and 94 of the Human Rights Committee Provisional Rules of Procedure. Also Schmidt, 1992:646.

5 Rule 94(2) of ibid.. and article 5(4) of the Optional Protocol.

and to the State party concerned" (rule 94(3). It should be pointed out that through the three stages discussed above, the personal appearance of the concerned victim is out of question. Moreover the Optional Protocol has made it a condition to hold its meetings dealing with individual communications in camera.[1] This is yet another illustration of the influence of the principle of the sanctity of states under international law.

4.2.6. The Successes of the Optional Protocol System

The individual communications procedure under the Optional Protocol has been commended as "the most visible and most affective of all complaints procedures administered by human rights treaty bodies."[2] This is in view of the substantial number of State parties to the Covenant which have acceded to the Optional Protocol since it came into force, an expression of international appreciation of such effectiveness. By 29 July 1994,[3] 76 States had ratified the Protocol out of the 127 State parties to the Covenant slightly less than 60 per cent.[4] This is no small fraction for an optional procedure.

The above number includes 16 African countries. Although that is only 21 per cent of the international total, it is comparatively significant at the regional level, as it is 43 per cent of the 37 States parties to the Covenant from the continent. As a result, even the number of individual communications reaching the Committee has tremendously increased, as is shown by Table 4.3 below.

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1 Article 5(3) of the Optional Protocol.

2 Schmidt, 1992:646.

3 The closing date of the 51st Session of Human Rights Committee.

4 HRC, 1994:1, para 1.

TABLE 4.3. The Status of Individual Communications Received and Considered by the Human Rights Committee as of 29 July 1994

	Communications in Numbers	Communications as % of Total
Total communications Registered	587	100
Declared Inadmissible	201	34.2
Discontinued or Withdrawn	94	16
Admissible but Inconclusive	31	5.2
Pending at Pre- admissibility Stage	68	11.5
Concluded by Final Views	193	32.8

SOURCE: Report of the Human Rights Committee 1994.

In addition to what is portrayed in Table 4.3 above, there is the fact that during the 51st Session alone (1994), 35 communications were registered. This is about 6 per cent of the total number of 587 for all the 51 sessions held in the 18 years between 1977 and 1994. Otherwise the table shows how effective the Committee's work has been over all these years in this regard. The 32.8 per cent concluded communications may not at face value seem impressive. But when these are added to 201 communications declared inadmissible and 94 discontinued or withdrawn, the total number comes to 488, which is a significant 83 per cent of the total. Only 31 communications or 5.2 per cent remained inconclusive. This efficiency of a periodic international institution, is unrivalled for many standing judicial and quasi-judicial bodies, even at the domestic plane. Thus the accusation invariably levelled

against the Committee as being a perpetrator of the justice delayed syndrome, cannot be supported by these statistics.[1]

4.2.7. The Problems Involved in the Protocol System

As has already been indicated above, one major problem has been the growing number of complaints, resulting from the increase in the membership to the Covenant.[2] But most notable is the fact that since 1987, "the cases themselves have also tended to become more legally complex." that is:

> "While many of the Committee's decisions adopted during the early years of operation concerned human rights violations which were relatively easy to pinpoint from a legal point of view, such as ill treatment of political prisoners or arbitrary detention, the Committee has since been called upon to examine, for instance, discriminatory aspects of social security in certain countries, or the economic aspects of the enjoyment of minority rights. Procedural flexibility and innovation are called for if the Committee is not to become a victim of its own success.[3]

Undoubtedly the above, has invariably contributed to the delay experienced in finalising some communications.

In any case, the Committee has itself over the years attempted some solutions by way of amendment of its Rules of Procedure, the main objective being the expansion of its ability to attend more cases during the three sessions it holds annually. This includes among others its decision in 1987 to appoint a Special Rapporteur for cases involving capital punishment to deputise the Committee, even between sessions and at extremely short notice.[4]

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1 Schmidt, 1992:648.

2 The 587 communications received by the Committee by 29 July 1994 as illustrated in Table 4.3, involved a total of 44 States parties, that is about 58 per cent of all States ratifying the Optional Protocol. See HRC, 1994:63, para 376.

3 Schmidt, 1992:648.

4 Ibid.

4.3. The System under the Covenant on Economic, Social and Cultural Rights

The UN was compelled to adopt two instruments on human rights, because of the extent to which Economic, Social and Cultural Rights were divorced from Civil and Political Rights. The two covenants were seen as providing for quite different obligations and systems of international control. This was despite the original intention of making them comprise similar rights,[1] which were "interdependent and indivisible."[2]

The International Covenant on Economic, Social and Cultural rights is a landmark in the history of human rights protection. For the first time economic, social and cultural rights were legally recognised in a single comprehensive convention.[3] This re-confirmed achievements of the Universal Declaration which had marked the beginning of the development of new regimes of rights.

However, such departure was not done with ease, in spite of the majority support of the Third World and former socialist countries. Strong reservations were expressed by developed countries, against the whole idea of economic rights, which led to the adoption of a covenant described by Robertson and Merrils as a "promotional convention". The Covenant only lists standards which they undertake to promote and which they pledge themselves to secure progressively to the greatest extent possible, having regard to their resources.[4]

The above effect is well exemplified in the formulation of the provisions of the Covenant. For example in Part III thereof,[5] which engulfs the catalogue of the rights provided, State parties are merely required to recognise such rights,[6] or may be much more

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1 Robertson and Merrils, 1993:229. Note their discussion on the simularities and distinction of the two covenants

2 Alston, 1987:747.

3 They had hitherto been invariably promoted and protected in uncoordinated international regimes such as that of the International Labour Organisation (ILO).

4 Alston, 1987: supra.

5 See text in Hemalengwa, 1988:19.

6 Ibid. See articles 4, 6, 7, 9, 10, 11, 12, 13 and 15.

serious but rarely, to undertake to take steps, or to ensure certain conditions.[1] This is soft wording compared to the classical form employed by the other Covenant wherein the phrases used are "everyone has a right to ..." or "no one shall be subject of ..."[2] The former formulation can only reflect a weak compromise which resulted from the long negotiations.

Nevertheless, the Covenant is still new hope for the future of rights struggles in the Third World. This is illustrated in article 2(3) thereof, which provides for the principle of positive discrimination in the sphere of international investment law and practice. The paragraph allows countries to "determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals." Robertson and Merrils have dismissed this provision for being irrelevant, saying that neither of the two covenants protects the right to property.[3] But the importance of this provision can only be appreciated when one considers the challenges faced by post-colonial nations who invariably attempt to control their natural resources to the prejudice of inherited guarantees of foreign property. For an international convention to address the tricky problem is indeed of no little significance.

In any case the list of rights provided is also encouraging to those who believe in the creation of an equitable world. It includes in article 6 the right to work; in article 7 the right to just and favourable conditions of work, including fair wages, equal pay for equal work and holidays with pay; in article 8 the right to form and join trade unions, including the right to strike; in article 9 the right to social security; in article 10 protection of the family, including special assistance for mothers and children; in article 11 the right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions; in article 12 the right to the highest attainable

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1 Ibid. See articles 2, 3 and 8.
2 Robertson and Merrils, 1993:231.
3 Ibid: 229.

standard of physical and mental health; in article 13 the right to education generally accessible to all; and in article 14 the right to participate in cultural life and enjoy the benefits of scientific progress.[1] Certainly if this catalogue of rights is taken to be a standard set for all peoples of the world, then its maximum achievement shall necessarily make the world a better place to live. How the movement towards that direction may begin depends on what measures the Covenant itself has set for its implementation.

4.3.1. Implementation of the Economic, Social and Cultural Rights

The Covenant on Economic, Social and Cultural Rights did not introduce a new system of implementation measures.[2] The UN system of country periodic reports to the ECOSOC was adopted.[3] By virtue of article 16(1) thereof, such reports are supposed to comprise an account "on measures which they have adopted and the progress made in achieving the observance of the rights recognised therein." It is the duty of the Secretary-General to receive the reports of which copies he has to transmit to the ECOSOC for consideration (art.16(2)(a)). Moreover, interested UN Specialised Agencies are entitled to copies of such reports also to be supplied by the Secretary-General, in relation "to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments" (art.16(2)(b)).

There is a deficiency in the above described system which distinguishes it from that of the Covenant on Civil and Political Rights. It is the central role accorded to the ECOSOC, essentially a political organ of the UN. The rationale for this system has been stated as being twofold. The first is the fact that the rights protected by the Covenant are also the concern of the several UN Specialised Agencies which also are supposed to report to the ECOSOC. But the second which goes unsaid, was "that most States preferred to entrust implementation to a political body over which they could exercise full control, rather than a specialist body which might seek to develop either independence or expertise ,

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1 List adopted from Robertson and Merrils, 1993, ibid.

2 Alston, 1987:747; Robertson and Merrils, 1993:231, citing Schwelb, 1968:363.

3 Part IV of UNGA, 1966a.

or worse still both."[1] This was a fatal omission. Apart from that, the ECOSOC being a UN organ with a wide scope of activities under the Charter of the UN, the responsibility cast upon it by the Covenant would be unmanageable by the Council itself.[2]

It was within those limitations and remedial measures attempted in 1978,[3] that the ECOSOC had to reconsider its position, ending with the establishment of the United Nations Committee on Economic, Social and Cultural Rights in 1985.[4] In many respects the latter was intended to operate as a double of the Human Rights Committee[5] described above. Thus the new Committee became the only one of the six UN human rights protection bodies,[6] which is not a creature of an international treaty.[7]

Conclusively one can say that, the Covenants on Human Rights are remarkable fruits of the international community's endeavour in the promotion and protection of human rights. Although they are derived from the Universal Declaration, they provide for broader definitions of rights.[8] Moreover in spite of the differences of the rights protected, the two Covenants and their parent instrument the Declaration, have already assumed the international reputation of being the most reliable sources of international human rights law. This is because of their substantial contribution to the global development and recognition of human rights.[9] Nevertheless the basic conceptual question has not already been settled, that is as to whether these important incidences of modern international law duly "constitute

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1 Alston, 1987, 748.
2 Robertson and Merrils, 1993:233.
3 See Alston, 1987: 748; Robertson and Merrils, 1993:234.
4 Coliver, 1992:181; Alston, 1987:747; referring to Alston, 1987a.
5 Alston, 1987:748.
6 Including: the Human Rights committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against women (CEDAW), the Committee Against Torture (CAT), and the Committee on the Rights of the child(CRC).
7 Coliver, 1992:181.
8 Robertson and Merrils, 1993:35.
9 Deutch, 1995:557.

an exhaustive definition of human rights,"[1] for now and the future. It is attempted to answer that question in Chapter Five dealing with the controversy surrounding the recent emergence of new human rights.

4.4. Tanzania and the Human Rights Committee 1977-1981

Having defaulted for several years, Tanzania ultimately submitted its first periodic report which was considered during the Committee's 281st 282nd and 288th meetings held on 7 and 9 April 1981.[2] The report did not say much apart from repeating the governments oft-stated commitment "to establish a society based on respect for human rights."[3] Implying that the above could be achieved even in the absence of the guarantee of human rights in a constitution, the presenting delegate mentioned the Permanent Commission of Enquiry, the Anti-Corruption Squad and the Leadership Code Committee, all of which were institutions under the President's Office. These she said were operating effectively as alternatives to the conventional methods of promotion and protection of human rights. Reference was also made to some laws to support her case, such as the Law of Marriage Act of 1971, the Civil Service Act of 1962 with its Civil Service Regulations, surprisingly arguing that these "contained provisions designed to ensure the *full* enjoyment of a number of rights under the Covenant.[4] The rest of the report dealt with the delegate's justification for the presidential powers under the Preventive Detention Act 1962,[5] insisting that after all, the President had hitherto been using the powers "sparingly."[6]

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1 Ibid:548.

2 See HRC, 1981:42-47, paras.202-26. Since then Tanzania has also submitted her second periodic report which is not part of our discussion here. See Summary Record of the 1190th Meeting of the Human Rights Committee, CCPR/C/SR.1190, 7 April, 1993. P.2.

3 HRC, 1981:42.

4 Ibid.

5 Cap.490 of RLT, 1965.

6 HRC, 1981:42.

It is imperative to state at the outset that the contents of the report bore an indication of the government's misguided view of what it meant by human rights protection at national level. That the delegate was audacious to claim that human rights were protected and enforced through the executive organs of the Head of State, is simply strange. This is not to say about the laws mentioned as being capable of ensuring *full* enjoyment of the rights under the Covenant.

The members of the Committee, having identified the problem, began their reactions by explaining what was expected to be covered by the country report. Then dealing on specific rights of the Covenant, the Committee requested an explanation as to the publication and sensitisation of the Covenant's provisions to the general populace, before giving probing comments on each right. These included the right to self-determination under article 1; the question of having a separate Bill of Rights providing for the invalidation of unconstitutional laws in conformity to article 2; the rights of women by virtue of article 3; presidential powers to declare a state of emergency in derogation of article 4; the right to life and the rationale of continuing with the death penalty contrary to article 6; the guarantees available against torture, cruel, inhuman and degrading treatment or punishment by virtue of article 7 and 10; the guarantee against arbitrary arrests or detentions and the availability and effect of the *habeas corpus* system under article 9; the restrictions to nationals against foreign travel under article 12; the level of judicial independence under article 14; the freedom of press, right to form free trade unions and the justification of continuing with the one-party system contrary to articles 19, 21, 22 and 25; familial matters including the minimum age for marriage, law of parental authority, child care for working mothers, the status of children born out of wedlock, custody of children, and property rights after divorce by virtue of articles 23 and 24; and the rights of minorities especially those of Asian origin under article 22.

It is beyond the scope of this thesis to examine how Tanzania has responded to all of the above queries. Part Three of this thesis will attempt a case study of how the collapse of the one-party political system affected the freedoms of association, peaceful assembly and the right to political participation. But worth mentioning is the fact that the grilling and human rights education that the Tanzanian delegation was subjected to, contributed to the government's subsequent reassessment of the previous policy of frowning at any suggestion about the inclusion of the Bill of Rights in the Constitution. Indeed it has been confirmed,[1] that there was no direct international pressure forcing the government to adopt a Bill of Rights 1984, as retired President Nyerere was unlikely a person to yield thereto.[2] It was the indirect pressure arising from the contradictory positions the government took in the various human rights areas as was exposed by the Human Rights Committee, which reopened the debate on the Bill of Rights within the government circles and later at the Ruling Party organs.[3]

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1 Personal interview with Hon. Joseph S. Warioba, Tanzania's former Attorney General 1971-1985, and Prime Minister and First Vice-President 1985-1990.

2 J.K. Nyerere's persistent objection to IMF and World Bank economic measures despite the country's fiscal problems is an open secret.

3 Warioba's interview.

CHAPTER FIVE

New Human Rights and the Africa Regional Regime

This chapter provides analysis of the post-1966 developments in international human rights law, with particular reference to the emergence of new human rights. It is shown how the coalition between the former block of socialist countries and the Third World has pressed for the re-definition of the concept of human rights, beyond the individual-oriented outlook. It is within the context of this dialogue at the Global plane, that in the Africa Region, albeit for different reasons that the African Charter on Human and Peoples Rights was promulgated in 1981. Thus it was not surprising that the African Charter comprised some of the new rights, and hence for dealing with the two herein.

5.1. The Enunciation of New Human Rights.

The development of a new regime of human rights is said to form the grey zones of international human rights law because of the controversy involved. It is still an unsettled part of the law, and yet it has occupied sufficient concern of international law to be ignored. The demand for new rights during the three decades of the post-1966 Covenants period, is evidence of the fact that the human rights map cannot be limited to boundaries already demarcated by the United Nations. However one cannot have the audacity of downplaying the living truth that, "the Universal Declaration and the two Covenants undoubtedly serve as the basis of international human rights."[1]

Thus the controversy evolving around new rights, is centred in the tug of war between two competing definitions of the content of international human rights law. The first is the conservative

[1] Deutch, 1995: 557.

view which includes in the sphere of human rights , "only those rights declared as such by institutions of the United Nations." The second view is progressive as it is happy to embrace new developments, provided they fit in the presumed guidelines which outline "the characteristics of human rights."[1] The distinction of the two positions is not clear-cut. This chapter discusses the right to development, a new solidarity human right already proclaimed to be an inalienable human right by the UNGA. We also discuss the circumstances which gradually are leading towards the recognition of consumer rights as part of international human rights law.

5.2. The Right to Development as an Instance of the Third Generation Solidarity Rights.

The new rights evolved within the UN system are invariably called third generation solidarity rights. The word 'generation' is used to establish that human rights are not immutable.[2] Certain values in society have been recognised by international law through various epochs of social development, now called generations of rights. The first generation marks the recognition of the liberal-democratic principles of the rights of man discussed in Chapter Two. These rights are "the contribution of the First World and are essentially bourgeois."[3] Moreover these traditional rights are said to be negative, mainly concerned with "the prohibition of the interference by the State in the freedom of the individual to do as he or she please(s)."[4]

The second generation human rights are the contribution of the Second World, having resulted from the social values emanating from the 20th Century Russian Revolution,[5] and other "philosophical and political positions of socialist and Marxist writings."[6] They are positive rights , including "economic, social and cultural rights, characterised by the intervention rather than the abstention of the State."[7]

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[1] Ibid: 546.
[2] Marks, : 503.
[3] Adelman, 1993.
[4] Marks, : 503.
[5] Adelman, 1993.
[6] Marks, : 503 - 4.
[7] Ibid: 504; Adelman, 1993.

Then come the Third Generation human rights which resulted from "the anti-colonial revolutions that began immediately after the Second World War and culminated in the independence of many nations around 1960."[1] Briefly stated they are, "prompted by the demands of the Third World in response to colonialism and imperialism, global interdependence and the changing nature of the World economy."[2] Explaining why these rights are new, Vasak is quoted as saying inter alia, that they:

> "are new in the aspirations they express, are new from the point of view of human rights in that they seek to infuse the human dimension into areas where it has all too often been missing, having been left to the State, or States.... [T]hey are now new in that they may both be invoked against the State and demanded of it; but above all (and herein lies their essential characteristic) they can be realised only through the concerted efforts of all actors on the social scene; the individual, the State, public and private bodies and the international community."[3]

One sees two points of departure from the other two Generations of rights. First that "they are at an early stage of legislative process...."[4] Secondly they are based on the joint action and responsibility of all peoples of the world, and hence the nomenclature `solidarity.'[5] However this is not an entirely novel programme, as the UN Charter itself imposes affirmative legal obligations on the UN as an organisation and on its member states, acting jointly and severally to promote both "economic, social and cultural developments" and "human rights and fundamental freedoms".[6] Yet it is these characteristics of the new solidarity human rights which are at the core of the disagreement both at the diplomatic level within the UN, and philosophically within academic circles. Let us now examine some of these controversies in respect of the right to development, an instance of such rights

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[1] Marks, : 505.

[2] Adelman, 1993. "A global neighbourhood" in which about 20% of the population the North, control and enjoy about 80% of its resources, whilst the other 80% of the population (the South) control and enjoy less than 20% of the said resources" See Okafor, 1995: 865. Also Franck, 1993, Rubin, 1986, Head, 1991, Head, 1989, and McCall, 1984.
[3] As quoted by Marks, : 506.
[4] Alston, 1983: 14. Also Head, 1987 and Franck and Mwanansangu, 1982:12.
[5] See ibid.
[6] Paul, 1995: 308.

which include; the right to a clean environment, the right to peace and the right to humanitarian assistance.

5.2.1. The Declaration of the Right to Development.

Although the right to development is as old as humanity,[1] the present idea was first coined by Keba M'baye, former Senegalese Chief Justice, in 1972.[2] This was followed up by the UN Commission on Human Rights in 1977, when it adopted a resolution requesting the UN Secretary-General to prepare a study on the "international dimensions of the right to development as a human right in relation to other rights based on international co-operation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs."[3] Following the Secretary-General's report submitted in 1979,[4] the ECOSOC appointed a Group of Government Experts whose work resulted in the adoption by the UNGA of the Declaration to the Right to Development in December 1987.[5]

The Declaration's Preamble has seventeen paragraphs, of which five are dedicated to finding its legal foundations in the provisions of the UN Charter, the International Bill of Rights and in other international instruments. Then there are four paragraphs on the right to self-determination which is made to include the right of States to sovereignty over their national resources, and emphasising on non-discrimination of any kind, including elimination of domination of any type. The following two paragraphs are intended to make a connection between development and human rights, insisting on the giving of equal attention and urgent consideration of all human rights. Then the other two paragraphs serve to relate the right to development to questions of international peace and security, showing how progress can be achieved through disarmament. And of the last four paragraphs, one emphasises on the centrality of the human person in the development process, the other on the

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[1] Adelman, 1993.
[2] M'baye, 1978. Also Donnelly, 1984.
[3] See Ghai, 1993.
[4] ibid.
[5] See UNGA, 1986.

primary responsibility of States, the third pointing to the New International Economic Order as a prerequisite of the promotion of human rights, and the last confirming the inalienability of the right to development.

Otherwise, the Declaration comprises only 10 substantive articles , which assert rather than define the right to development, providing for; participation, contribution and enjoyment by all people of economic, social, cultural and political rights; the interdependence of all human rights without prioritisation; primary responsibility of states to promote human rights with that of individuals being secondary;[1] and the elimination by states of conditions of gross violations of human rights and the promotion of the New International Economic Order. (arts. 1 - 6) Thus states are required to:

> "formulate development policies for the full realisation of the right to development ; these should include steps to eliminate obstacles to development resulting from the failure to observe civil and political rights as well as economic, social and cultural rights and to encourage the participation of the people in the development process, and ensure equal access to basic needs and resources and to a just order."[2]

In essence, "the right to development is an integral part of the demand of the hemispheric south for a new international economic order (NIEO) [3]

Positive contributions of the project have been listed to include the fact that the right has helped to clarify the notion of development by establishing what Ghai calls "the ethical basis of development", that is, the linking of development to human dignity. There is also elaboration of the relationship between the different generations of rights by emphasising that the right to development "is nothing less than the synthesis of the various human rights and that it points to their interdependence and the need to make progress simultaneously on all fronts."[4] This could help to close the debate as to which has priority between civil and political rights on the one hand and

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[1] Note the view that the Right to Development is both a collective and individual right. See Okafor, 1995: 869. Also Kiwanuka, 1988 and Stewart, 1989, who argues that the satisfaction of the basic needs of an individual was also an object of the right to development.
[2] Yash Ghai's summary, supra.
[3] Okafor, 1995: 867; Paul, 1992, Van Boven, 1982L 59 and Alston, 1988.
[4] Okafor, Ibid.

economic, social and cultural rights on the other. The other positive contribution is the mending of the Western bias of international law, by what Ghai calls the "Third Worldisation" of international law. And the last positive advance in the law is the fact that the right to development aims at transforming development into a claim from a mere entitlement.

But apart from the above, Ghai has attacked the foundations of the right to development. He sees the project as having nothing to do with the cultivation of Third World democracy, but just as an illustration of the hypocrisy and cynicism of the concerned governments. According to him, "the right to development will divert attention from the pressing issues of human dignity and freedoms, obfuscate resources and support for the State manipulation (not to say repression) of civil society and social groups."[1] Thus it is asserted that it is hypocritical for the Third World to use the right to development as a scapegoat for the economic failures and promotion of repressive regimes, the willing partners in the "exploitation of the people and resources.

It is therefore insisted that the real causes of Third World economic misery are in the most part grounded in the Third world itself, in particular the undemocratic policies of the omnipotent political regimes , which invariably have championed flawed developmental strategies, largely characterised by over-expenditures in useless militarization and grandiose bureaucracies. This negative view is common in the relevant literature.[2]

The problem of this view is in its omission to examine the real problem to which the sponsors of the right to development desired to address themselves. The main issue of the project was not to point fingers at the devil responsible for the underdevelopment of the Third World. Instead concern was directed to the question as to whether with such growing gap between the rich North and the poverty-stricken South, this world would continue to be the best place to live on. It was queried as to whether human rights would thrive within such a wanting international dis-equilibrium. It is this concern which invited the innovation and theme spelt out by the Declaration of the Right to Development, the need for international solidarity. It seemed then to be common

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[1] Ibid.
[2] See among others, Shivji, 1989: 29 - 33, 81 - 83; Kibola, 1982; Donelly, 1984; Donnelly, 1993: and Cottrell, 1993.

ground that the Third World could not all alone come out of the quagmire of underdevelopment. The solution was seen to be in the joint international commitment towards the development of the whole world and all peoples. If Ghai would have moved from the above-stated premise, undoubtedly his assessment of the foundations of the right to development would have taken an optimistic outlook.

There is also the criticism arguing against the right to development's "statist coloration."[1] It is emphasised that by installing States as the custodians of the right to development for the "public good,"[2] what the Declaration does is to sacrifice individual rights which are private at the altar of community rights, which are the preserve of the State. This is so because of the principle of state sovereignty prominently features in the Declaration. And yet community rights are not properly defined. We revert to this problem below in respect of the African Charter.

The net effect of this project is the subjugation of human rights to development, or in short the invitation through the back door of the flawed idea of developmentalism.[3] And although the Declaration creates the right to development with the status of being a "synthesis of all human rights,"[4] the same does not grant any specific rights to the disadvantaged such as the right to food, shelter, education etc.. This means that while Third World States are inclined towards an outward demand for solidarity development assistance from the developed world, any aggrieved person or people may not on the basis of the Declaration successfully move some action in any tribunal whatsoever against their government. Indeed in this manner the UNGA Declaration may be accused of having taken the international human rights discourse several decades backwards.

The above is related to the two main objections to the right to development, namely, its non-justifiability and incompatibility with the ruling philosophy of international law. The non-justiciability objection has been disposed of by Phillip Alston's observation that in the international human rights discourse it is settled that the appropriate measures of implementation are,

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[1] Shivji, Ibid.
[2] Adelman, 1993: Cassese, 1986: 370.
[3] See Shivji, 1989: 32 - 33.
[4] See Ghai, 1993.

"implementation and supervision,... rather than those of justiciability or enforcement."[1] In any case if some of these rights would be incorporated in national constitutions, the presumption is that they would have to be enforced like any other rights in accordance with the relevant constitutional provisions. Indeed, even at the international plane, there is still room for further improvement in this regard.

As to the problem of incompatibility, such claim is more political than legal.[2] Briefly stated, the right to development by entirely departing from the paradigm of the first generation of human rights, was in direct conflict with the foreign policy of the United States, the only country which voted against the UNGA Declaration. The US views the right to development as:

> "... little more than rhetoric exercise designed to enable the Eastern European countries to score points on disarmament and collective rights and to permit the Third World to "distort" the issue of human rights by affirming the equal importance of economic, social and cultural rights with civil and political rights and by linking human rights in general to its "utopian" aspirations for a new international economic order."[3]

We mentioned in Chapter One that the post-War human rights discourse is essentially political. But once political activity leads to the crystallisation of tangible legal principles, it is counterproductive to go back to some articulation of a country's unilateral political interests, as the USA did in this instance. Fortunately indeed, other Western countries have not followed the US line.[4] This signifies the collective will of the international community towards the gradual concretisation of whatever stands now in the UNGA Declaration on the Right to Development, however controversial, contradictory or vague it may be. Thus the incompatibility problem will be resolved through the redefinition of the foundations of the present international human rights law. This process is already an ongoing concern, having started with the UN Charter provisions, through the International Bill of

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[1] Alston, 1983: 35.
[2] On the binding nature of the Declaration, see the supporting position of the South in Downs, 1993, Alston, 1984, Head, 1987; and as for the opposing position of the North see, Varges, 1983; Others include: Espiell, 1981, Tieya, 1986, Akerhurst, 1977, Trinidade, 1986, Schwebel, 1979, Reisman, 1988, Higgins 1987, Delupis, 1987, Gruchalle - Wesieriski, 1987, Chinhin, 1989, and Riphagen, 1987.
[3] Alston, Ibid: 22.
[4] Ibid.

Rights, and now with the clarification of the new solidarity rights. In all of the above, new conceptual foundations in terms of both content and procedures, have entered the arena of international law, thus confirming the complexity of the development which Aston describes as "the pluralistic foundations of international human rights law."[1]

Nonetheless the right to development, despite the anti-climax it has suffered during the last Decade is still a living reality. There exists already a multiplicity of international development agencies within and without the UN involved in law-making in the realm of development, [2] evidence of the presence, relevance and vitality of the right to development. Also it is now accepted that there is in place what has come to be known as the International law of development.[3]

Therefore what is required is to set a new agenda for action, which is capable of pulling this project out of the thorns of controversy inherent in the fragile North - South compromise visible in the UNGA Declaration on the Right to Development. A clear-cut consensus on the central issues must be achieved, otherwise the present state of what Aston calls "shadow boxing,"[4] will continue without any effective results save for tons of UN paperwork of resolutions.[5]

However, that can only be done if the fundamental question of democracy in the Third World is put on the top of the said agenda.[6] The question of development should be seen in terms of the specific needs of the people of the underdeveloped world equally in both their individual and community capacities, rather than through the bureaucracies of their national states. If the people individually or in identifiable groups, will be made capable of making certain developmental claims albeit minimal, against their governments or otherwise from the international economic aid market, it is then that one can confirm the birth of modern international human rights law. But so that this new phase may qualitatively look different from the former in terms of content and effect, the Third

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[1] Ibid: 28. See the effect of the Right to development in Okafor, 1995:885 - 884, being: law-generation, law - regulation and law de-legitimation.
[2] See Paul, 1995: 309, citing the UNGA, ECOSOC and other developmental programmes.
[3] Ibid: 312.
[4] Alston, 1983: 39.
[5] See re-confirmation of the 'Right to Development' by the recent Vienna World Conference on Human Rights and the Cairo World Conference on Population. See Vienna, 1993 and Cairo, 1994: Ch. 1.6. Also Akafor, 1995. 878.
[6] See also in Adelman, 1993.

World countries must realise that their desired aspiration the New International Economic Order, cannot be procured only by fine rules of international law, but through struggle in all its forms.[1]

5.3. The Case for Consumer Rights as an Instance of Non-solidarity New Rights.

Recently a claim has been voiced of the possibility of elevating consumer rights beyond its present domestic plane.[2] This is not an empty claim, considering the international concern consumer rights have of late attracted. If that call is positively responded to by the international community, then a new type of rights will develop. These would include those which are basically private, and yet involve public interest, and hence the term "non-solidarity new rights".

Consumer rights are not an old branch of the law even at domestic level, having largely grown after the second World War.[3] Yet in spite of the gravity of the problems covered by this law, it has not reached the stage of acquiring some formal recognition as rules of international human rights law. But it is argued that there is sufficient evidence to establish the claim that there has already taken place some indirect recognition of consumer rights as part of economic rights as declared in the Universal Declaration of Human Rights and the relevant covenant.[4] The Declaration provides for an individual's "right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity". (art. 23 (3)) Moreover it allows the "right to a standard of living adequate for the health and well-being of himself and of his family." (art. 25 (1)) It is argued that in these provisions, the objectives of the Declaration and those of consumer protection law are synonymous, and that broadly the former indirectly provide for the latter.[5]

The same is said of article 11 of the Covenant on Economic, Social and Cultural Rights, which provides inter alia, for the right to "adequate food, clothing and housing, and to the continuous improvement of living standards.[6] The same comparison is also extended to articles 12 and 13 of the

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[1] Ibid.
[2] Deutch, 1995: 557.
[3] Ibid.
[4] Ibid: 558.
[5] Ibid: 559.
[6] Ibid: 562.

same covenant, the former providing for the right to health, while the latter is concerned with the right to education.[1]

The above liberal interpretation of international law instruments may be difficult to comprehend, weakening the claim for which it was employed to support. Yet such interpretation can only be accepted if it is supported by some overt action of the international community expressing some interest in the global protection of consumer rights. This is not wanting in this case. On 9 April 1985, the UNGA adopted a resolution on the United Nations Guidelines on Consumer Protection (UNGCP),[2] following long and concerted efforts of the International Organisation of Consumer Unions (IOCU), subsequent to the organisation's World Congress of 1975 in Australia.[3]

5.4. Other Recent Developments in the Law.

During the period of about three Decades following the two 1966 international covenants on human rights, a number of conventions have been adopted by the UNGA, as relating to some specific areas of human rights law. These include; the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973,[4] the Convention on the Elimination of All Forms of Discrimination Against Women of 1979,[5] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[6] and the Convention on the Rights of the Child.[7] All of these have their own supervisory authorities which invariably apply implementation measures, more or less similar to those already discussed in Chapter Four.

Moreover, on 15 December 1989 the Second Optional Protocol to the International Covenant on Civil and Political Rights dealing with the abolition of the death penalty, was adopted by the UNGA. It entered into force on 19 July 1991. Unfortunately as of 29 July 1994, only 23 States

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[1] Ibid: 563.
[2] UNGA, 1985.
[3] See Deutch, 1995: 563, for the details of the UNGCP and the stages it passed before being adopted by the UNGA.
[4] UNGA, 1973.
[5] UNGA, 1979.
[6] UNGA, 1984.
[7] UNGA, 1990.

parties to the Covenant had ratified or acceded to the Protocol.[1] Of more interest to this work, there is a conspicuous absence of African countries in the list, as only Mozambique had ratified the Protocol.[2] However it was not intended to discuss in detail the above-mentioned international instruments.

Another important occurrence worth mentioning is the World Conference on Human Rights held in Vienna Austria from 15 to 26 June 1993, which with an attendance of 800 non-governmental organisations apart from the representatives of states and international organisations and agencies, was "the largest assembly ever on global human rights issues".[3] This Conference, despite being plagued with disagreements and "obstructions by some in the preparatory meetings",[4] adopted the Vienna Declaration and Programme of Action[5] on 25 June 1993. Among other things, it re-confirmed the priority given to the protection and promotion of human rights by the international community.

But of more significance to this study, was the World Conference's concern over the traditional claim of state sovereignty as a shield against the international concern of human rights violations. The Conference firmly re-stated the right of the international community to express their concern over human rights malpractice in any country.[6] Nevertheless it was not possible during the conference to extend this principle of international acceptability to the extent of urging for the establishment of an international criminal court, although remarkable efforts towards that end had earlier been in place within the UN system.[7] Neither could the conference reach agreement on the right of international intervention into the borders of a sovereign state, to prevent the continuance of wanton human rights violations.[8]

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[1] See HRC, 1994: 96.
[2] Ibid.
[3] Boyle, 1995: 79.
[4] Ibid: 81.
[5] Vienna, 1993. See Okafor, 1995: 878 - 881.
[6] Paragraph 5 of ibid.
[7] See Tomuschat, 1993.
[8] On the developments of this right see Rodley, 1992.

Apart from that an attempt was made to deal with the perennial controversy surrounding the issue of the conception of human rights as universal. The same was attacked by the countries of the Third world who still preferred cultural relativism in this regard, while it being defended by the Western countries on account of the establishment of global standards for all mankind. This lead to the Conference's cautious confirmation of universality in paragraph 5 of the Vienna Declaration and Programme of Action thus:

> "All human rights are universal indivisible inter-dependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional peculiarities and various historical cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political economic and cultural systems to promote and protect all human rights and fundamental freedoms".

Most significantly was the way the Vienna World Conference dealt with the new human rights linkages with democracy and development.[1] Thus paragraph 8 of the Declaration and Programme of Action stated that, "Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually re-enforcing". In that way what the conference achieved was to forge a compromise acceptable to all sides of this issue discussed above in respect of the right to development.[2] Thus according to Boyle, the Conference document established:

> "...convergence between the developed and developing world that development requires a democratic base. Democracy, defined as a political system which is based on the freely expressed will of the people and which involves the full participation of men and women in all aspects of their lives, provides the political framework for the guarantee of all human rights. Development in turn requires effective institutions governed by the rule of law and popular participation by men and women on equal terms".[3]

This theme features in the discussion in Part Three of this Thesis.[4]

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[1] Refer to the discussion on this linkage in Chapter One.
[2] Supra, in this Chapter.
[3] Boyle, 1995: 90.
[4] Chapter Ten

The other aspects covered by the Vienna World Conference, included the deliberation on the theme `women rights are human rights', and on the rights of indigenous peoples, minorities and the disabled. The conference also recommended that the UN through the Commission on Human Rights, the UNGA and other organs and agencies take specific action to consider ways and means for the full and immediate implementation of the recommendations of the Vienna Declaration and Programme of Action. The UN Commission on Human Rights was thus recommended to be the organ with the responsibility of reviewing annually progress towards that end.

It is too early to give any assessment of the implementation of the commitments made during and after the Vienna World Conference. Yet it is interesting to note the reaffirmation of the international community's commitment towards human rights in spite of the controversies during the last Decade elucidated above. Indeed a lot of optimism still lies ahead of the present generation.

5.5. The Enforcement and Protection of Human Rights in Africa.

Contemporaneous with the campaign at the international level for solidarity rights there were also attempts geared towards the promulgation of an international human rights instrument for the Africa Region. Necessarily and for the purposes of consistency, the founding fathers of the African Charter on Human and Peoples Rights had to adhere to some rights being demanded by them at the international plane. This section mainly explains why the African Charter came into existence at the time it did, providing the background to the discussion in Chapter Nine, on its influences to the Tanzanian Bill of Rights.

For the first two Decades after 1960, post-independence Africa had been in the defensive, labouring under criticism for lack of seriousness in human rights. As early as 1961, under the auspices of the International Commission of Jurists, the African Conference on the Rule of Law had invited African Governments thus:

> "...in order to give full effect to the Universal Declaration of Human Rights of 1948,...to study the possibility of adopting an African Convention of Human Rights in such a manner

> that conclusions of this conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states;"[1]

But the above-quoted were the aspirations of Western-trained lawyers of the newly independent nations of Africa. The politicians had their own.

As we illustrated in Chapter One, from the beginning the desire of the nationalist leaders of newly independent Africa was to establish strong authoritarian states capable of coercing development come what may.[2] To most of them, the human rights agenda was of little significance, in spite of the re-affirmation in the OAU Charter of 1963, of their adherence to human rights.[3] On the contrary, what followed thereafter in the 1960s and 1970s is known history of military coups and counter coups, large-scale bloody massacres of innocent civilians and the consolidation of single-party regimes, not consonant to the pledges of human rights observance mentioned above. Moreover the OAU had in the past been criticised for keeping mum about the anti-human rights atrocities openly caused by the bloody military regimes in Bokassa's Central African Republic (1966 - 79), Nguema's Equatorial Guinea (1969 - 79) and Amin's Uganda (1971 - 79), among many others.[4]

The empty promises of the African ruling elite in favour of human rights protection was outward looking. It meant to them an unequivocal commitment to the eradication of classical colonialism from the Continent, and in particular the overthrow of the Apartheid regime in South Africa.[5] Otherwise inwardly, every African state was regarded as exclusively responsible for all matters concerning affairs within the borders of their states.[6] Yet the economic backlash that followed the failure of the developmentalist experiment in Africa by the late 1970s brought the African leaders to their knees.

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[1] See Declaration No. 4 of the Preamble to the LAW OF LAGOS, reprinted in Hamalengwa, 1988: 37, 38.
[2] See also Asante, 1969.
[3] See OAU, 1963.
[4] See Umozurike, 1979: 198 - 9; Sharma, 1974; and AFRICA, 1977.
[5] Umozurike, 1983: 902, 903.
[6] In accordance with article III of OAU, 1963. See Umozurike, 1979: 199; and supra Chapter Three and Four.

There had always existed contradictions within the post-independence neo-colonial state formation in Africa.[1] On the one hand it was being advocated the promotion of allegedly social values like monolithic leadership seen to be divorced from the Western colonial past. Ironically on the other hand, Africa was tightening the umbilical cord which tied the Continent to imperialism in terms of absolute economic dependence. The challenges of this contradiction gave African regimes no chance at the height of the economic crisis. A legitimating balance of the paradox had to be sought.

This was partly done by cries at the Global level, for the re-definition of the concept of human rights discussed in this chapter. At the regional level efforts were made to install the African human rights law, which would in effect provide space for the perpetuation of single-party and military regimes in Africa. It is in this context that the African Charter on Human and Peoples' Rights , was unanimously approved on 17 June 1981, by the Eightieth Assembly of Heads of State and Government in Nairobi, Kenya.

5.5.1. The African Communitarian Conception of Human Rights.

It has often been claimed that the African Charter is different from other regional instruments for its communitarian conception of human rights.[2] It is said to be based on the so called African legal philosophy. That it departs from the classical emphasis on the fundamental rights and freedoms of the individual, to focus on the wider community. Consequently the Charter was made to provide for rights to be enjoyed by the individual in his capacity as a member of a particular community or group together with other members of the latter. In that sense rights were socialised by taking the individual to where he belongs.[3] This outlook is propagated in the Charter by the consistent use of

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[1] For a positive analysis of the African Charter see Gyen-Wado, 1990: 190 - 196 and Marasingne, 1984: 32 It is argued that the charter, "recognises the development of norms of human rights on the global plane and incorporates these human rights that are consistent with African aspirations and perspectives" Gyde-Wado; 1990: 190 - 1.
[2] D'sa, 1985: 73 - 74; Mojekwu, 1980; Gittleman, 1982; Marasingne, 1984.
[3] Peter, 1990: 53.

the phrase `peoples' rights', in addition to the provisions setting out the traditional individual-oriented rights.

Thinking legalistically one has to see this as an introduction of new subjects of international law, the people in their collective rights, not prominent in the classical human rights approach. The issue which ensues is whether it is the peoples in the sense of the toiling masses in the street, factories, forests, fields and lake or river, the majority of the African population, who are intended to enjoy most of the rights provided for in the Charter.

The answer should be in the negative, taking into account the Charter in its totality. It seems that the founding fathers of this Treaty intended that most of the rights it provided should be enjoyed by the state, as a collective representative of the so called `peoples'.[1] It follows that the people in the sense of grassroots communities and other forms of popular organisations are not the real beneficiaries thereof.[2] Undoubtedly this is not only novel, but is also distortion of the essence and concern of human rights protection, although the same is found in the Declaration of the Right to Development.

Basically human rights are at the root of it all, legal and extra-legal devices for limiting state intervention into the liberty, freedom and other rights and entitlements in public law, of individuals in both their personal capacities and/or as part of specified groups of people. Surprisingly in the African Charter the state against whom rights are supposed to be vindicated, has become the main holder thereof on behalf of the undefined peoples!

This anomaly is well illustrated by the provisions relating to the right to self-determination. Article 20 unequivocally grants this right to the peoples, describing it as "inalienable". Yet the real meaning of the phrase `peoples' in the article is revealed when one comes to article 29 wherein individuals are given a duty of among others, to preserve and strengthen the national solidarity, particularly when the latter is threatened,[3] and to preserve and strengthen national independence and

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[1] See Kiwanuka, 1988, for a detailed discussion on the phrase.
[2] Shivji, 1989: 59 - 63.
[3] Sub-article (4) of article 29.

territorial integrity of his country.[1] This is in effect outlawing justified secession from any African country, which is an integral part of the right to self-determination under contemporary international law.[2]

It is clear that in the context of their anti-colonial crusade, the founding fathers of the Charter intended `peoples' to mean any African communities ethnic or otherwise, with common nationalistic aspirations of ridding themselves of colonial domination. Yet by virtue of the above-cited article 29, such definition seems untenable in the post-colonial context, when `peoples' have come to mean and include the state within the national borders inherited from colonial demarcations, which have already been declared by the OAU to be sacrosanct.[3]

5.5.2. Claw-back Clauses and the Catalogue of the Duties of Individuals.

Other peculiar features of the Charter include the curtailment of the rights provided with claw-back clauses, and the imposition of duties or obligations on individuals, towards the family and society, the state and other recognised communities and to the international community.[4] As far as claw-back clauses are concerned it is intended here to draw a distinction between ordinary derogation clauses and claw-back clauses. The former which are a common feature in other international instruments on human rights, call for a temporary suspension of specific rights by the state during certain periods of time such as during national or other emergencies including war. Claw-back clauses on the other hand, apply to limit the operation of rights provided, "not only in emergencies but in everyday circumstances".[5] Surprisingly the African Charter does not provide for any derogation clauses like the European and the American Conventions, but is full of claw-back clauses. Yet nothing is prescribed as criteria to be adhered by Parliament or any other legislative authority in the making of laws capable of superseding human rights. This illustrates the statist

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[1] Sub-article (5) of article 29.
[2] Shivji, 1989: 80.
[3] For more details see Blay, 1985; D'Sa, 1985: 77 - 78; Mumba, 1982: 105, 106; Dinstein, 1976: 104.
[4] Article 27 (1) of the Charter. For the discussion of the cultural relevance of this provision see Mutua, 1995.
[5] Higgins, 1976: 281; D'sa, 1985: 75 - 76.

characteristics of the Charter. The same was one way of justifying the preventive detention legislation in many African countries.[1] As this anomaly was subsequently adopted by the Tanzania Bill of Rights, we discuss in details its legal implications on human rights in the country in Chapter Nine.

There is a also a catalogue of duties of the individual in articles 28 and 29, intended to bring home the message of the Charter, the priority of community rights in the custody of the state, over any rights claims of individuals. This has also been described as a positive innovation characteristic of the African traditional social values.[2] But most duties provided are general and unenforceable and may only amount to moral obligations.[3] Moreover at the instance of the Charter's approval in 1981, there was little remaining in neo-colonial Africa, of the pure African traditional social values to require the founding fathers' protection by positive international law. The commoditisation process initiated by the colonial conquest had been completed by the graduation of all post-colonial Africa at the instance of attainment of political independence, as peripheries within the world capitalist system.

What one may say about the African leaders' oft-glorified reminiscences of the old African values, is that the same were somehow theatrically presented as a means to an end, that is the compromising of individual rights to the advantage of the desired continuation of authoritarian institutions of political governance in the Continent. [4] In that sense, within the framework of the politics of economic dependence, the rights provided were to remain in the Statute Book as shopping lists for the attraction of foreign assistance.

The other distinctive feature was the Charter's incorporation of the substance and spirit of the international law of development discussed above. Thus one sees provisions creating the right of peoples to freely dispose of their wealth and natural resources. (art. 21) This suggests an aspiration of African countries, for economic independence, which unfortunately without addressing the neo-

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[1] Asante, 1969: 72, 99.
[2] See Gye-Wado, 1990:191.
[3] D'Sa, 1985: 76 - 77. The unenforceability argument cannot hold water in respect of the duty to contribute to the defence of the country under article 29, which effectively invites forced conscription into the armed forces.
[4] See Nyerere, 1969.

colonial question as the Charter omits to do, remains to be wishful thinking. One sees in article 21 (3), a compromise of the principle enunciated in the same article, by the subjection of the right to "the principles of international law". The latter imply strict adherence in instances of nationalisation of foreign properties by host African countries, to the payment of prompt and adequate compensation, which is beyond the fiscal ability of these poor and economically dependent countries.

Besides that the Charter has also imposed on states in article 22 (2) the duty, "individually or collectively to ensure the exercise of the right to development". This indeed is a step forward from the parameters of the UNGA Declaration on the Right to Development, thus departing from the depiction of Third World countries in the latter as the net passive receivers of economic aid with minimal duties in that regard. To indicate their seriousness in the matter, an enforcement mechanism in the form a reporting system is provided for in article 62. Now whether such mechanism can efficiently operate like in the 1966 International Covenants regime discussed in Charter Four depends on the status accorded to the enforcement organ provided for [1].

Briefly stated, the charter in Part II thereof establishes the African Commission as the main enforcement organ (Art. 30). The Commission is part of the Organisation of African Unity (OAU) system. Its eleven members draw salaries from the regular budget of the OAU, (Art. 44) although their manner of election[2] and qualifications (Art. 31), "on the whole ... falls in line with the general formalities of such international bodies."

It is the commission's linkage with the highest political and executive organs of the OAU, the Assembly of Heads of states and Governments and the secretary General respectively, which compares it unfavourably with other similar human rights regional enforcement mechanisms.

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[1] For a comparative analysis of the enforcement systems under the African charter and the European Human Rights convention, see Gye-Wado, 1990.

[2] By the Assembly of the African Heads of State and Government.

In due execution of its Mandate under Chapter II Part II of the Charter, the Commission is not independent, operating subject to the directions of the Assembly of African Heads of State and Governments. Moreover it has a limited mandate only operating as a clearing house.[1] Indeed this makes the African Charter have little to do with the real protection and enforcement of human rights as is understood under any international law regime. The issue is whether there is now any justification of continuing with the same regional legal regime. This should be answered in the negative at this time following the crumbling of most of the authoritarian political systems in Africa, of which legitimation as we have indicated above, the same was made serve, protect and justify. There is indeed need for the re-negotiation of the Charter, to establish an enforcement organ which is relatively independent, like the European court of Human Rights. [2].

In the last three chapters this Part established the link between the international map of the human rights discourse with their protection in Tanzania. The novelty of this discourse has been illustrated, indicating how only within the past five Decades the same has come to monopolise both the diplomatic and legal fora at international level. Significant to this study, is the fact that it has been established that human rights are a living phenomenon, having expanded from the traditional liberal-democratic version to the present generation of solidarity rights albeit with resistance, and now looking ahead to a bright future.

As for Tanzania, in her part as an active member of the international community, she has not been spared of the impact of the international regime of rights. Part Three of this Thesis will illustrate how the above influence could be used to emancipate the country from the fangs of the anti-democratic culture. The desired end is to push for an argument for the betterment of democracy and civil society. But before doing that, in Part Two, it is intended to discuss the Bill of Rights first as part and continuation of the right struggles of the people of Tanzania, and secondly, in the context of the building of the institutions of governance.

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[1] Shivji, 1989: 104 - 106. Gye-Wado positively looks at the OAU Commission linkage as necessary means of the Charter to attain political legitimacy and acceptability which are imparative for the operation of the enforcement machinery.
[2] There are ongoing arrangements to establish the African Court of Human Rights. I thank Prof. Shivji for passing the information to me. Also see McAuslan, 1996:176.

PART TWO

ORIGINS OF THE BILL OF RIGHTS IN THE CONSTITUTIONAL HISTORY OF TANZANIA MAINLAND

CHAPTER SIX

The People And Early Rights Struggles 1800 - 1914

This chapter provides background information and history about rights struggles of the people of Tanzania Mainland in two main epochs. The first dwells generally on the pre-colonial period which ends at about 1885. It is emphasised here on sporadic but significant resistance of a number of societies, against domination and inhuman treatment. Then in the second period dating from 1885 to 1914, which involves the German colonial conquest, it is illustrated how the early movements of the indigenous people against this modern and socio-economically advanced form of external intervention, created a precedent to be learnt in later rights struggles of the people.

6.1. The Country and People of Tanzania Mainland.

Lying between the three African Great Lakes, Victoria marking its northern border, Tanganyika the western and Nyasa/Malawi in the south, Tanzania which is a united republic,[1] is a country in eastern Africa bordering the Indian ocean. With a total area of 945,234 sq. Kms (883,739 sq. Kms of land and 61,495 sq. Kms of water),[2] it is located just south of the Equator. Furthermore, she has a coastline of 1,424 Kms. She also shares land boundaries of a total of 3,402 Kms, that is including 451 Kms with Burundi, 769 Kms with Kenya, 475 Kms with Malawi, 756 Kms with Mozambique, 217 Kms with Rwanda and 338 Kms with Zambia.[3]

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[1] Of Tanganyika now called Tanzania Mainland, which attained political independence on 9 December 1961, and Zanzibar which also became independent on 10 December 1963. After the Zanzibar Revolution of 12 January 1964, the two states formed a union of two governments on 26 April 1964.

[2] See Strom, 1995: 7. Also BOS, 1994: 1, giving as the total area of Tanzania Mainland 942,800 sq. Kms (i.e. 861,300 sq. Kms land area and 61,500 sq. Kms water area); and that of Zanzibar as 2,400 sq. Kms.

[3] See Tanzania Information from the CIA Server, from NETSCAPE [Tanzania] - Location: htt: www.odci. gov/cia/publication/95fact/tz. html.

Tanzania Mainland can be divided into five natural regions,[1] which generally represent three main geographical features, namely, plains along the coast, central plateau and highlands in the North and South. The first region is the western Plateau which is a woodland savannah rising between 1,000 and 1,500 metres above sea level, and receiving in the main less than 1,000 mills rainfall per year. Most of this region's areas particularly in the centre of the country are semi-arid. Secondly, the north-west is marked by an area of higher land with heavier rainfall and greener vegetation, the same bordering the western shores of lake Victoria. It extends to the Rwanda/Burundi borders in the West, and drops into the Kagera Basin towards the Northern border with Uganda.

The third region are the southern Highlands which are mountains and high plateau running southwards along the Zambian border in the south, and going round through the northern and eastern shoreline of lake Nyasa. The fourth is the south-east region which is also woodland savannah land gently sloping towards the Indian Ocean. And the fifth region is the high mountainous north-east with high peaks such as Kilimanjaro, the highest in Africa, Meru, Upare, Usambara and Uluguru. These rise off the Eastern Plain as pockets of rainfall and forest land, and indeed the most suitable land for agriculture.

6.1.1. The People.

Not much is known about the inhabitants of Tanzania Mainland before the beginning of this millennium. And although the first Bantu speakers who make over 90 per cent of the current population, are said to have entered the western hinterland of lake Victoria by 500 BC, by the early 19th Century the country "was not inhabited by discrete, compact, and identifiable tribes, each with distinct territory, language, culture and political system".[2] Most societies had just recovered from a series of migrations for the most part coming as late as the 18th Century.[3] Thus the history of modern Tanzanian societies can best be seen not as a "collection of histories of individual tribes, but

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[1] Iliffe, 1979: 6, Chapter 2.
[2] Ibid: 7 - 8.
[3] The Ngoni Invasion from Southern Africa in the 1840s caused great social upheavals and migrations in southern and south-eastern Tanzania.

a story of fusion and interaction by which all tribes and groups have been constantly altered or even formed."[1]

At any rate, judging on the basis of the linguistic criterion, Tanzania is the only country in Africa which has the four main African language families. One identifies all of them living in close proximity of each other within Kondoa District of central Tanzania.[2] This illustrates the social interaction described above. Thus the over 120 tribal groups in Tanzania have been correctly divided by historians,[3] into four main ancestries. The first are the Khoisan hunter-gatherer Sandawe, who are said to be the remnants of the earliest Tanzanian Bushmen inhabitants. These later migrated to South Africa where their descendants still survive. This group is the main exception to the mainstream pattern which includes agriculturists and pastoralists made of at least more than one tribal group. The latter are made of first the most numerous thereof the Bantu language speakers, who are said to have migrated from the Niger-Congo and Benue-Congo river basins, and who may be classified into 7 sub-families. These are the interlacustrine Bantu,[4] the western Tanzania Bantu,[5] the southern highlands Bantu,[6] the southern Tanzania Bantu,[7] the central Tanzania Bantu,[8] the coastal hinterland Bantu,[9] and the highland Bantu.[10]

The third family are the Nilotic groups which have origins from the Chari-Nile river valleys, the Tanzanian groups specifically coming from the eastern-Sudanic minor family including; the River-Lake Nilotes the Luo living south of the Kenya border east of lake Victoria, the plains Nilotes, that is the Masai, Arusha and Kwavi, and the highland Nilotes Kalenjin whose family members in Tanzania are the Okiek/Dorobo and Galla of the northern plains. And the last family are the

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[1] Sutton, 1974: 94 - 5.
[2] Ibid: 79; Iliffe, 1979: 8.
[3] See Sutton, 1974: 82 - 83, Figure 12.
[4] Including the Jita, Kerewe, Kara, Zinza, Haya, Ha, Hangaza, Subi, Vinza and Jiji.
[5] Including the Sukuma, Sumbwa, Nyamwezi, Konongo, Kimbu, Bungu, Holoholo, Bende and Tongwe.
[6] Including the Fipa, Pimbwe, Rungwa, Lungu, Mambwe, Wanda, Ndali, Namwanga, Nyiha, Malila, Safwa, Lambya, Nyakyusa, Sangu, Hehe, Bena, Kinga, Pangwa, Wanji and Kisi.
[7] Including the Pogoro, Ndamba, Ndengereko, Matumbi, Ngindo, Mbunga, Yao, Mwera, Machinga, Makonde, Makua, Nyasa, Matengo, Songea Ngoni and Ndendeuli.
[8] Including the Gogo, Kaguru, Iramba, Isanzu, Iambi, Nyaturu, Rangi and Mbugwe.
[9] Including the Swahili, Zigua, Rufiji, Zaramo, Ngulu, Luguru, Kutu, Vidunda, Sagara, Kami, Kwere, Doe, Taveta, Shambaa, Bondei, Pare, Nyika and Digo.
[10] Including the Segeju, Sonjo, Kuria, Shashi, Zanaki, Ikoma, Meru, Chagga and Gweno.

Afrosiatic or Cushitic groups who are said to have Caucasoid origins and thus peculiarly different from the rest who are the pure Negroid or Black race. The Tanzanian groups directly originate from the southern Cushitic sub-family, as divided into the Rift Valley groups made of the Iraqw/Wambulu, Goroa and Burungi, and the other two groups, that is the Sanye and the Mbugu.

These are the indigenous tribal groups which make 99 per cent of the total population of Tanzania including Zanzibar, now estimated at 27,985,660.[1] The last population census in 1988 had the Tanzania Mainland's annual average population growth rate at 3.2 per cent, compared to that for Zanzibar which stood at 2.7 per cent. Moreover the Mainland population density was 25.5 persons per sq. Km. while that of Zanzibar was 260 persons per sq. Km. And the proportion of urban population in Tanzania Mainland was 8.87 per cent compared to that of Zanzibar which was 3.85, indicating that the country's population is entirely rural. Finally on population distribution, the sex ratio for Tanzania Mainland was 96 meaning that for every 100 females there were 96 males. That of Zanzibar was 97.[2]

Looking at the number and diversity of the above-listed tribal groups, one sees a fragmented and divided society in Tanzania. But that is not apparent on account of the widespread use of *Kiswahili*. The latter is a Bantu language which has during the past couple of Centuries attained the unrivalled status of the country's *lingua franca*. Moreover there are other historical factors which contributed to that state of affairs which are discussed in this chapter. However it should be emphasised that ethnic diversion and the problems which go with it are real in Tanzania. This is despite the post-independence ruling regime's consistent suppression of the fact. In Chapter Eleven this issue is brought to light in the context of recent constitutional changes for wider democracy.

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[1] 1994 estimates by the CIA Server, supra. The figure of the last Census in 1988 is 23,174,336 for the whole of Tanzania; and for Tanzania Mainland 22,533,758 and 640,578 for Zanzibar; with the population growth calculated at 2.8 per cent for Tanzania Mainland and 3.0 per cent for Zanzibar. See BOS, 1988.

[2] BOS, 1988: 5 - 6.

6.2. Early Resistance Against External Domination.

The Coastal region of Tanzania is said to have been known by the outside world by the first Millennium AD.[1] It was around this period that urban centres developed along the Coast. Among them was Kilwa, which between 1200 and 1500 was the unrivalled headquarters of gold trade.[2] It was subsequently plundered by the Portuguese intruders in 1505.[3]

Thus before 1800 nothing was known of the interior of Tanzania Mainland except for the southern Yao-dominated long distance trade route. The same commenced from Kilwa to the east, south and west of lake Nyasa.[4] It was originally used for the transportation of gold from Mozambique until the 16th Century Portuguese intervention. But it regained its prominence in the 17th Century. This followed the expulsion of the Portuguese in 1698 by joint action of local insurrection and Arab seamen from Oman.[5]

It were these Arabs who were to control the whole of the Coast of East Africa and hinterland for the good part of the 18th Century. Originally interested in the ivory trade, the Arab traders lured the Yao chiefs' participation in the inhuman slave trade following the increased demand thereof, both in the French-dominated Reunion and Mauritius Islands, and back in Oman. It is said that by 1810, 6,000 to 8,000 slaves were annually sold at Kilwa and Zanzibar, the said number having risen to 45,000 in 1839 and 70,000 in the 1860s, following even a higher demand thereof in the clove and copra plantations of Zanzibar and Pemba. But what is worth noting for our purposes is the accusation invariably levelled against the Yao rulers and related chiefs, of having been the main perpetrators of the inhuman trade. It implied that, "society had yielded to the temptation of personal profit without any consideration for the consequences for society as a whole... a simple struggle for survival, stripping its participants of all dignity and shattering society".[6]

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[1] Iliffe, 1979: 35, citing Sutton, 1966: 7 - 9.
[2] Iliffe, 1969: 12.
[3] Iliffe, 1979: 36.
[4] Alpers, 1974: 236.
[5] Iliffe, 1969: 12.
[6] Alpers, 1974: 235 - 236.

This is a distortion of truth to strip the Arab and French slave traders of the real blame, for the introduction and propagation of the barbaric business. It should be insisted that the southern trade route was the first introduction of the outside world to the interior of Tanzania. This had the impact of guiding the local people into a different socio-economic context. Their contact with the massive market economy provided opportunities for the procurement of relatively new and fascinating commodities. It also opened up the relevant societies to new and expanded social interactions, which were translated into the formation of the hitherto unknown socio-political patterns. These included the formation of stronger forms of state institutions capable of assuming their right to self determination. The words and deeds of one of the resistance leaders of the time Machemba,[1] do not support the story that he was a mere despot Yao ruler and warlord of the Makonde plateau.

Some other long distance trade routes were later developed by the beginning of the 19th Century, one of them being in the north-eastern part of the country. This had become, "by the middle of the Century, one major route... along the Pangani river basin, starting from the coastal centres between the Umba river (north of Tanga), and Pangani, and penetrating as far as Kilimanjaro and beyond it to Masai country".[2] The other one was the Central route which we discuss in detail in the next section.

6.2.1. The Central Trade Route and Nyamwezi Nationalism 1800 - 1885.

It was not until after 1800 that the Nyamwezi, a collection of communities speaking similar languages and occupying the central part of the western plateau of Tanzania, made some contact with the Coast and Zanzibar. Thus they established another important trade route. This cut across the country westwards towards lake Tanganyika and beyond. Previously the Nyamwezi had ventured

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[1] He actually defeated several German expeditions until he was overcome in 1899, and rather than surrender , he had this to say to the German general Von Wissman, thus: "I have listened to your words, but can find no reason why I should obey you - I would rather die first .... am sultan here in my land. You are sultan there in yours ... I will not come to you, and if you are strong enough, then come and fetch me". See Iliffe, 1994: 296 - 7.
[2] Kimambo, 1991: 2.

southwards to Katanga in the present Democratic Republic of the Congo, through Ufipa and Lunda country in Zambia, in search of copper. This route had a north-western connection to Uvinza on the Malagarasi river at the salt mines.

The central trade route became an important area of commercial activity in the region. This followed the growth of Zanzibar as the centre of prosperity in the whole of East Africa, following the transfer of headquarters by the Oman sultan Seyyid Said to the island town in 1840. The move boosted the rise in ivory prices and greater demand for slaves. Thus with the availability of such new commercial opportunities, the Arabs now engaged directly in the trade by personally making inland travels. They thus reached Ukimbu in 1825, and Ujiji on the shores of Lake Tanganyika in 1831. Later they made Tabora in the Unyanyembe chiefdom, the most important centre because of her being centrally placed and rich in ivory.[1] Indeed the direct participation and control of the ivory trade by the Arabs on this route, increased the terrible brutality of the slave trade.[2]

Moreover the necessity for the thousands of pieces of ivory to be carried hundreds of miles to the Zanzibar market, increased its horrors. Slave portage became so rampant to the extent of rendering the slave trade itself of secondary importance, unlike the previous situation in the south.[3] There was such massive movement of human labour that it is recorded that in 1850, Zanzibar's population of 150,000 included 60,000 slaves.[4]

More significant was the fact that "the Nyamwezi controlled more of the trade than Arabs and Swahili".[5] This was the state of affairs when Milambo and Isike assumed power as rulers of the rival Nyamwezi states of Urambo and Unyanyembe respectively. Briefly stated, through portage, "capitalist relations, appropriate labour by economic means",[6] did enter Tanzania Mainland through the back door. And indeed, the trade in ivory and slaves became an activity around which political power had to be articulated. This was to be illustrated by Milambo between 1870 and 1884.

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[1] Bennent, 1974: 213; Iliffe, 1969: 41.
[2] Iliffe, 1974: 245.
[3] Ibid.
[4] Iliffe, 1979: 42; Bennent, 1971: 12.
[5] Coulson, 1982. It has been noted by Iliffe, 1979: 44 - 45, that a missionary reckoned that 15,000 to 20,000 Nyamwezi visited the Coast each year in the 1880s, and that around 1890, 100,000 Africans travelled the central caravan route.
[6] Iliffe, ibid: 45.

Much has been written by historians about Milambo and the rise and fall of his Kingdom of Urambo.[1] However what is worth mentioning is the fact that Milambo created a formidable state commanding absolute allegiance from his conquered lands, out of an insignificant chiefdom of Uyowa. This was unlike most of his contemporaries such as Mutesa I of Buganda, Mkwawa of the Hehe, and even Isike of Unyanyembe,who had inherited established kingdoms from their fathers. By sheer military brilliance Milambo built an empire using his own resources, and commanded respect and fear within and without to as far as Zanzibar.[2]

Thus able to exercise his right to economic self - determination using military means where necessary, he effectively fought the Arab colonisers of Tabora in a protracted war between 1871 and 1875. He was resisting against the unfounded claims of the dominance by the latter of the Western part of the Central trade route. The exercise of this right is well articulated in his words when he was quoted as having said; "I wish to open it (my country) up, to learn of Europeans, to trade honestly with all and to cultivate peaceful relations with my neighbours".[3]

It was clear that Milambo, in fighting the Arabs was not claiming absolute and exclusive control of the trade route, but free trade and equal participation therein of all nations. Undoubtedly, this principle is acceptable even in the modern international trade discourse. It is for that matter that he was friends with any European who dared to call at his palace, and actually missionaries stationed in Urambo had direct access to him until his death in 1884. Yet one can easily visualise what would have been his reaction to the German colonial advance, which reached the borders of his country just a year after he died. Actually it was Isike who in 1885 confronted the Germans.

Unlike Milambo, he is known to have not compromised with any European visitors. When the Germans desired to control his town and trade route without recognising his authority, he vigorously fought them winning several battles. He died by blowing himself up in his gunpowder

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[1] See among others, Iliffe, 1979: 62 - 4; Bennent, 1971; and Kabeya, 1966.
[2] There is evidence that even the British Representative in Zanzibar John Kirk was apprehensive about Milambo's power, and the 19th Century African adventurer Stanley described him as the "African Bonaparte". See Bennent, 1974: 127, 161.
[3] As quoted in Ibid: 142.

store. Indeed he preferred that to falling in the hands of his pursuers. And yet his dying remains were recovered by the latter in the wreckage, and were barbarically hanged as punishment.[1]

Besides the instances discussed above, there is a wide range of comparable examples. All tell the story that pre-colonial societies in Tanzania did reject foreign domination and other oppressive regimes, with all their means possible. Even with portage desertions were common, and deserters were usually flogged if recaptured. Moreover strikes were frequent and were conducted as collective actions to prevent the employers identifying ringleaders. In the north-east, small-scale popular attacks on slave traders and exploitative chiefs have been recorded. There is particular mention of the Kiva rebellion of 1869, which involved the Bondei people who rebelled against the oppressive and discriminatory treatment of sultan Kimweri's Shambaa kingdom, their rulers. The same is said of revolts by plantation slaves in the Pangani area. After 1873 the slaves became numerous on the mainland when their export was prohibited, to the extent that they established an independent republic at Kikongwe.[2]

The above exposition was concerned with tracing the origins of Tanzanian nationalist and rights struggles to their real origins in the pre-colonial state formations. The examples of the two Nyamwezi rival states, illustrate how the opening to the outside world and the growth of international trade, operated as catalysts for a higher form of political organisation. The same were capable of effectively thwarting external intervention. However one negative assessment should be made about the way resistance was articulated at that level. *It was purely parochial and sporadic, with less* potential for effecting wider impact and scale. We now move to higher levels of resistance which followed the imposition of the German colonial rule over Tanzania Mainland.

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[1] Ibid: 173; Iliffe, 1969: 292.

[2] Iliffe, 1979: 46 - 73, also reporting on the incidences of the 1870s and 1880s when the Mbugu of Gare in Usambara murdered a Kilindi chief, and the Pare of Mbagha besieged a slave traders' settlement at Kisiwani.

6.3. The German Colonial Conquest and the Rise of Organised Resistance 1884 - 1914.

German rule in Tanzania Mainland was established at first not by the direct participation of the government.[1] Yet Germany had to be forced to change its anti-colonial policy because of a combination of factors. The first set was domestic, that the German government was compelled to look for some alternative and potentially profitable overseas settlement under her control. This was to replace as alternative destination, the undesirable mass exodus of her nationals to the USA by the beginning of the 19th Century. The second set of factors were economic. As the industrial revolution was maturing during the second part of the Century, Germany was desperately in need of a reliable source of raw cotton to supply its textile industries. She had to respond to protective markets for the agricultural product. Moreover it was already obvious that Africa was potentially rich in mineral wealth, the conquering of which would also provide ready markets for German industrial products.

The other factors included the effects of the Great European Depression between 1873 and 1896, the formation of cartels and monopolies for the maximisation of profits, and the consequent rise of industrial production costs following the better organisation of the working class. The reformulation of government policies in favour of colonialism, was well received by the German public with Bismarck's re-election in 1884.[2] The Capitalist monopolists were set for the acquisition of new areas where they could easily export their capital in search of cheap labour. For the working class, it was yet another opportunity to begin afresh, away from the unbearable capitalist conditions of the time.

Certainly there were also some strategic considerations involved. The East African Coast emerged as a significant area of interest following the opening of the Suez Canal. The colonisation of its hinterland would justify Germany's control of coastal towns and harbours. It was for those

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[1] Coulson, 1982: 33, says that, "Bismark argued that colonies would bring more trouble to Germany than advantage, and refused to have anything to do with them".
[2] Ibid: 34 - 5.

reasons that attention was given to the work of a German adventurer Karl Peters. The latter had earlier in 1884 through his Society for German Colonisation (*Gesellschaft fur Deutsche Kolonisation*), travelled to East Africa for a colonial mission. Having walked in only six weeks 100 miles inland, he compelled several chiefs to sign a number of treaties. The latter generally ceded their regal powers and other rights over their respective territories to Peters' society. On going back home, the German government encouraged Peters to form a limited liability company, the German East Africa Company, with the main object of administering the new colony.[1]

Karl Peters' treaties were unequal and certainly a hoax in international law. One cannot come to terms with the question as to how could several sultans he contacted know the impact of what they were doing with this stranger. There were obvious limitations in the concerned local rulers, not only as to the German language employed, but also the exact conceptualisation as to what sort of regime their supposedly contracting party was representing! The insignificance of consent in the said treaty arrangements was to be illustrated not so long thereafter.

The Zanzibar sultan who had earlier assumed jurisdiction over the East African Coast and its hinterland, protested to the British against the German initiative. In response he was forced to concede when Bismarck's five warships arrived in Zanzibar, and the British were too much engrossed in other colonial problems of their own to intervene. Thus in 1886 the sultan's jurisdiction was forcibly restricted to the 10 mile strip along the East African Coast opposite Zanzibar, but excluding Dar Es Salaam.[2] Even that was purchased in 1888 by the Germans for 400,000 Marks.[3] Karl Peters' further treaties inland as far as Uganda, Rwanda and Burundi, necessitated the Anglo-German Agreement of 1890. The Treaty set out the borders of the German East Africa protectorate, which included present Tanzania Mainland, Rwanda and Burundi. This sphere of influence had

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[1] Ibid. See also Iliffe, 1969: 11, citing Muller, 1959.

[2] That the rest of the East African Mainland was divided between the Germans and British by the Anglo-German Treaty of 1890 - Cmd. 9475, para 48, which set up the frontiers. Chidzero, 1961:9.

[3] Coulson, 1982: 35.

earlier been declared by Bismarck at the Berlin Conference for the Partition of Africa of 1884 to 85. And thus the colonial conquest had been accomplished.

6.3.1. The Resistance Against German Colonial Rule.

Between 1885 and 1890, the colonial administration over German East Africa was only the concern of the German East African Company. The same was based along the Coast in respect of which regular administration had more or less been established by 1888.[1] German occupation was immediately responded by patriotic resistance from the Coastal areas. These were at first basically spearheaded by the people who would suffer most by the colonial system, that is the Arab slave traders who were frightened of losing their economic position. Nevertheless it should not be misconceived to think that the said incidences of resistance were limited to the members of their class only. The movement was popular resistance by the coastal people to foreign rule, just as they had resisted the Portuguese and Arabs before.[2]

One of such movements was led by one Abushiri bin Salum, a slave trader around Pangani Tanga, who was at loggerheads with the authority of the sultan of Zanzibar. The other stream was led by Bwana Heri a Zigua leader, who had never accepted Arab rule. Although this popular movement suffered some organisational defects, the seriousness thereof is illustrated by the fact that by the end of 1888, they had managed to drive the German East Africa Company out of the most important towns of Bagamoyo and Dar Es Salaam. This necessitated the direct involvement of the German government in May 1889. German troops led by Von Wissman, who later became the first Governor of the colony, vigorously crushed the resistance, imposing as much cruel and brutal reprisals to the people of the respective areas. For that matter, Abushiri was hanged, and Bwana Heri surrendered in April 1890.[3]

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[1] Iliffe, 1979: 46.
[2] Iliffe, 1969: 291.
[3] Ibid.

Meanwhile in the Hehe plateau of the southern highlands, a warrior chief Mkwawa had inherited the throne of his father Muyigumba. The latter had towards the first half of the 19th Century unified the Hehe state out of dispersed chiefdoms occupying the plateau. Having learnt advanced military tactics from an earlier defeat by the Ngoni, the Hehe under Mkwawa succeeded to establish themselves as the most powerful kingdom in southern Tanzania. When the Germans turned their attention to him, at first there were diplomatic initiatives endeavoured which ended in a fiasco with the killing of Mkwawa's peaceful emissaries sent to receive an advancing German expedition.[1] It was then that Mkwawa successfully executed an ambush in which German troops were devastated with 290 casualties.[2] Indeed that was one of the few major defeats Germans suffered as they expanded in East Africa. And yet it was only after a three year war that Mkwawa's fortress at Kalenga was finally run down by the Germans by relatively sophisticated bombardment. But it took another three years of guerrilla warfare to get hold of Mkwawa who killed himself to avoid his imminent capture.[3]

The heroic instances of resistance against the advance of German colonialism, were not without significance. Although sporadic, piecemeal, tribal and limited to only some areas of the colony, these illustrations of nationalism were later to be the telling examples of the consciousness of the oppressed people under colonialism. [4] This implied that however technically advanced and powerful, the coloniser was not invincible. However, the same rang some message in the German quarters, that if they were to procure the benefits of their conquest, it was high time they undertook their task with more commitment if not vigour. And indeed, on 1 January 1891 the German government took over from the German East Africa Company, the full administration of the Colony.[5]

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[1] Ibid: 292.
[2] Ibid. See also Bennent, 1974: 165.
[3] Bennent, ibid.
[4] See infra Chapter Eight.

[5] Iliffe, 1969: 292.

6.3.2. The German Colonial Constitutional Order.

There are two major principles on which any colonial constitutional order was based, at least in Africa. These are, first the civilising mission of which the coloniser feels compelled to associate himself with for the benefit of the savage natives. [1] The second as derived from the first, is the consistent and well-designed practice of inequality during the whole process. The first is the employment of the "Hobbesian picture of pre-European Africa, in which there was no account of time; no arts; no letters; no society; and which is worst of all continued fear, and danger of violent death".[2] The same comes out clearly in the following account of a colonial agent who states thus, quoting *in extensor*:

> "The native may be pardoned if he is somewhat sceptical as to the benefits he has yet reaped from the intrusion of the white man into his country. True, gone are the days when a sudden raid on the village meant the death of every able-bodied men and the carrying into slavery of every useful woman and child; and past for ever the exciting, soul-stirring times when haughty warriors on their proud battle dress and in the boastfulness of their arrogance went forth to combat a neighbouring tribe, who would neither expect nor give quarter, the women of the vanquished being the spoils of the conqueror; for ever dead is the fear that the chief's look of displeasure will bring in its train speedy death...."[3]

In brief what is impressed here are the benefits conferred to the native by the civilisation process namely; the release from tyrannical rulers, and the suppression of slave trade and inter-tribal warfare. And for those privileges, the savage native is thus condemned to colonial servitude, being the consideration thereof. Ironically, the coloniser does not appreciate his own history, of which humble beginnings were not divorced from tyranny, slavery and parochial warfare, all of which history tells us, were the antitheses within any social development at some particular time and space.

On the second principle, the same author has this to say:

> "Prestige is in savage Africa the force by which we rule, the only power that keeps millions of natives in subjugation to a few thousand Europeans. It is a

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[1] Ghai, 1981:9.

[2] Mudimbe, 1988: 1.
[3] Joelson, 1920: 79.

> strange mixture of respect and fear, a feeling of devotion to the ruling-race evoked by superior moral force."[1].

This is the main pillar of the colonial constitutional order, which consistently impresses on the `otherness`[2] of the colonised native by no means never to qualify the standard of the `us`, even after passing through the furnaces of the civilising process. It should be insisted here that the prejudices against the colonised native described above, were not extinguished at independence by the demise of old-fashioned colonialism. If ever the same died at all, then they still rule the Third World from the grave. Otherwise they were immediately thereafter resurrected by the forces of imperialism in the form of neo-colonialism.

At any rate, the principles discussed above, were no less central in the militarist constitutional order of German East Africa. Nevertheless because of limited fiscal and manpower resources, as compared to the territorial vastness to be governed, a compromise had to be made whereby indirect rule was devised. This was done by the appointment of Arab governors called *liwalis* in most sensitive areas like the Coast. In remote inland areas , administration was done through the appointment of local chiefs loyal to the new regime, as supervised by subordinate administrators known as *Akidas*, who were *Kiswahili* speakers appointed from the Coast. This was indeed one significant route through which *Kiswahili* language spread to the whole country.

The legal source of administrative authority was derived from the Imperial Decree of 1891, by which the head of the protectorate was the governor stationed in Dar Es Salaam. He was usually a soldier. The colony was divided in Districts each headed by the District Officer, of which number is said to have reached 22 in 1914. Considering the problem of poor communication, the District Officer was actually the ultimate authority. Using a Police Force, in most cases a company of between 100 and 200 African soldiers, he was responsible for the day to day administrative duties. These included tax collection and appointment and dismissal of chiefs and other agents. He was also

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[1] Ibid: 97.
[2] See Mudimbe, supra, for a full analysis of the "Discourse of Power and Knowledge of Otherness".

judge as well as executor of punishments.[1] There was no place for the practice of separation of powers. One can therefore see that even within the official structures, the constitutional order was autocratic. And yet the German administrator was more than that.

Also seriously limited in terms of budgetary constraints,[2] and full of apprehension for further rebellion, German rule was nothing but brutal instant injustice, meted by a strong and ruthless hand.[3] This was compuonded by lack of previous experience in colonial administration. It is said that, the German Governor was bound by but a few indefinite enactments and that in practice he was beyond the law. Specifically dehumanising was the German administrator's arbitrary application of corporal punishment, that it is said to have been "the rule rather than the exception".[4] There is evidence of use of corporal punishment for example on a native, "because he could not reply to the questions put to him in a disgracefully distorted semblance of Swahili both he and his companion were stretched out there and then a grinning N.C.O. proceeded to give each of them twenty-five stripes with the *kiboko*, or hippopotamus whip".[5] Other abominable incidences reported, include the application of corporal punishment to a cook and his assistant, simply because dinner was not in the satisfaction of the lieutenant in charge, or even the hanging of a cook for his failure in culinary duties. Thus it is no wonder that "Germans were known in the colony as people of "hamsa sherini"... people of twenty five".[6]

Indeed, the German colonisers seriously believed that they could successfully effect their lofty development plans using the iron hand. Emphasising economic development through plantation agriculture by employment of cheap African labour, they assisted European agriculture and peasant small-scale farming. To that end they divided the country into five regions, applying different economic policies for each of them.[7] The first was the Coast where they exercised firm control

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[1] Iliffe, 1974: 293 - 4.
[2] Ibid. Iliffe describes the administrative ratio in all parts except in European settlements and the Coast, to have been 1 District Officer to 1 million subjects.
[3] Ibid.
[4] Joelson, 1920: 26.
[5] Ibid: 201.
[6] Ibid: 201 - 2.
[7] Iliffe,1969: 12.

following earlier resistance discussed above, and also because of its logistical accessibility to the outside world.[1] The second was the north-eastern basin of river Pangani which became the centre of European enterprise, as it had easily accessible highlands. Here the Germans found local allies in the Usambara or Kilindi sultan Kimweri za Nyumbai and later his son Kinyesi, and in Kilimanjaro in Rindi of Moshi and Marealle of Marangu. The latter was the greatest provider of services for settlers and planters. The third region was the central and western Tanganyika of which Tabora, Mwanza and Bukoba towns had been reached in 1890, also establishing a military station at Ujiji. In this area, German impact remained minimal[2] and "central Tanganyika was still seen chiefly as an inexhaustible reservoir of labour for the north-western plantations".[3]

The southern highlands formed the fourth area. Also because of the intensity of earlier resistance of the Hehe and Ngoni, this region was virtually under military rule.[4] And lastly was the south-east, which was the most neglected, and yet this is the area wherefrom the MajiMaji popular war of liberation originated.

One sees from the above that the German colonial administration was determined to create a fragmented country with uneven development. That although the same was partly arrested by the immature demise of German rule, the effect of the policy can be seen in the lopsided development Tanzania has ever since experienced almost along similar lines.[5]

Whereas the north-eastern region favourable to European occupation attracted the better chunk of the colony's financial resources, the rest of the regions were economically marginalised. At best they operated as human and natural resources reserves. Thus it was not surprising for the first railway line to be constructed in the north-eastern region. It began in Tanga in 1891, and reached

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[1] Ibid. According to Iliffe, it had 7 of the 20 Districts with the capital Dar Es Salaam.
[2] Although they had friends in Kahigi of Kianja in Buhaya; Masanja of Nera and Makwaia of Usiha in Sukumaland; and in Kirunda of Unyanyembe.

[3] Ibid: 12 - 16
[4] Ibid. Iliffe notes that in 1897 a German garrison was established at Songea.
[5] See infra Chapter Eleven.

Mombo and Moshi in 1905 and 1911[1] respectively.[2] The same was intended to support plantation and settler agriculture, Europeans having settled in Usambara by 1898, Meru 1905 and Kilimanjaro in 1907.[3]

By 1905, sisal was the main crop, although between 1908 and 1912 great profits were reaped out of German rubber plantations. Coffee was also grown in this area in particular Kilimanjaro and Meru, to enable Africans pay taxes. Later on the central railway line was built , not primarily for the benefit of the western and central regions, but mainly for affording a better and prompt passage of labour from the traditional reserves of Unyamwezi and beyond. However in Bukoba, coffee which had been traditionally grown, was first exported in 1898. Also in Sukumaland, cotton was introduced by a European settler in 1911,[4] but was to be grown subsequently thereafter as an African small-holder cash crop also to provide taxes.

It was not until 1902 that a project was designed for the south-eastern region. The Cotton (*Volkskultur* or people's crop) Scheme was established by Governor Gotzen, first in Dar Es Salaam District but later in all southern districts. Each adult of an area was ordered to work for 28 days in a year on a plot identified at the Headman's Headquarters.[5] The forced labour involved was unbearable hardship to the population, without any tangible gains, as the project proved to be a total failure.[6] This was due to the low wages paid, and unnecessary interference with subsistence farming, added to the corruption and brutality involved.[7] It were these oppressive hardships which triggered the MajiMaji war.

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[1] For an account on the economic achievements of the Germans during thier 30 year rule of Tanganyika, see Chidzero, 1961:10.

[2] Iliffe, 1974: 293.
[3] Ibid. Iliffe records that by 1913 there were 5,336 European settlers in Tanganyika, that by 1904 the Governor's Council was all white, thus paving "way towards making Tanganyika white man's land".
[4] For an account of the economic achievements of the Germans during their 30 year rule in Tanganyika, See Chidzero, 1961:10
[5] Iliffe, 1969: 23.
[6] Iliffe, 1974: 293, indicates that poor crops led the Zaramo to receive only 35 cents each after the first year.
[7] Iliffe, 1969: 23.

6.4. The MajiMaji War of Liberation 1905 - 1907.

Unlike the earlier resistance discussed above, the MajiMaji uprising was not a revolt as it has invariably been described by historians. It was a war of liberation from the yoke of brutal German colonialism. Having been initiated in July 1905 by the people of the Matumbi hill west of Kilwa by forcibly driving away all aliens, the war spread to all parts of south-eastern Tanzania. By the time it ended it had involved almost a third of the colony.[1] Iliffe has identified three phases of the movement.[2] The first is related to the advance along the Rufiji river valley, wherein there had existed some common grudge against the German-imposed forced labour in the Cotton Scheme referred to above.

At this level the movement attained its mass orientation, on the basis of some religious ideology, the belief in Kolelo, a common spirit said to reside within the Uluguru Mountains. Thus every combatant was given a dose of water said to originate from Kolelo, which was meant to render the enemy's bullets and other ammunition harmless. Indeed this was "an attempt to find a new method of regaining independence ... [and] unity unlike earlier tribal resistance .... MajiMaji unity knew no tribe ... the "MajiMaji" symbol *"alama ya unamaji"* was a sign of comradeship".[3] This sense of unity is said to have been acknowledged by the Germans themselves, by referring to the movement as "a revolt of the people".[4]

In phase two, the movement while still within the Rufiji neighbourhood, ideologically it was transcending the geographical and tribal limits. This was when an appeal was made to all Africans thus: "Be not afraid ... Kolelo spares his black children". But it was in phase three that the movement spontaneously spread to very far off lands extending to Songea, Ubena and Upangwa near lake Nyasa. Because of the distance involved the unifying effect of Kolelo became extinguished. The "MajiMaji" rite was spread through special emissaries, preaching the "power to rid African

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[1] For the details of the war and how it spread, see ibid: 19 - 29.
[2] Ibid: 23.
[3] Iliffe, 1974: 295.
[4] Ibid.

societies of the two incurable evils, European control and sorcery".[1] Certainly by then the movement had attained political dimensions, to be specifically articulated by each society in accordance with their own anxieties. Thus in some areas collaborators were persecuted,[2] while for the Ngoni, "the effect of the MajiMaji was to re-consolidate the Ngoni people as their leaders took the opportunity to rid themselves of European control"[3].

Ultimately in 1907 the Germans brutally crushed the movement, with more than 75,000 African casualties, not mentioning the Ngoni chiefs who were hanged in public. There were many who perished as a result of other causes including the famine which followed thereafter.[4] Nevertheless the impact that the war made both to the Germans as well as to the indigenous people was significant. To the colonisers, it definitely changed their attitude towards native administration for, "no longer could they look on their African subjects as an element of decreasing importance in the life of the colony".[5] Indeed this was a remarkable victory to the rights struggle of the people of colonial Tanzania. It ended at least the dehumanising instant injustice and naked forced labour. The German estimation of the native as human had been raised by force.

As to the people of Tanzania Mainland, MajiMaji was an important and landmark precedent for the future. The fact that the war involved not only soldiers but the whole people, the same did in the long term provide, "an experience of united mass action to which later political leaders could appeal".[6] Indeed, the lesson of unity as the most effective means of national liberation against tyranny had been learnt, but with a prodigious price. And undoubtedly, the bloody suppression that followed the outbreak of the war, not only paved way to a relatively peaceful and uneventful British colonial administration, but left a visible scar of the culture of timidity within Tanzanian societies. The reflection of this is seen in the unhampered incivility the people of Tanzania silently endured during the three decades of the single-party rule. This will be discussed further in Chapter Ten.

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[1] Iliffe, 1969: 24 - 25.
[2] Ibid., giving examples of the Chief of Vidunda and Kiwanga of Kilombero.
[3] Ibid.
[4] Iliffe, 1974: 295.
[5] Iliffe, 1969: 27.
[6] Ibid., referring to Nyerere, 1967: 2, 40 - 1.

It has been shown in this chapter that the 20 year German rule over Tanzania Mainland was marked "virtually by a continuos series of native uprisings, and presented little opportunity for law-making in the field of general administration".[1] Indeed, by the time of their exit in 1914, the colony had not in any way established well grounded institutions of governance, let alone a system of law of her own. This fact did not escape the immediate attention of their successors the British. Taping their vast experience in native administration particularly in India and West Africa, the latter went on to adopt a style of administration divorced from the overtly autocratic and single-handed rule of their predecessors. It is to this that we now turn our attention in the next chapter.

[1] Cole and Dennison, 1964: 6.

CHAPTER SEVEN

Growth of Undemocratic Institutions of Governance 1919-1961

7.0 Introduction

This chapter examines some British Colonial policies in Tanzania Mainland focusing on the establishment of institutions of governance. The importance of this study lies in the fact that the undemocratic institutions devised by the British to meet colonial ends, formed the base on which the post-colonial administrative and political system was built. With minor modifications the same were inherited to the prejudice of democracy, good governance and human rights protection. It is argued generally that the colonial institutions in Tanganyika necessarily had to be enshrined with authoritarian measures of the administrative control from above. That this could be explained by the raison d'etre of the colonial regime itself. But important to the main argument in this thesis, was the fact that the totality of the colonial institutions so established, created in the country both psychologically and in fact, the negative culture of autocratic governance. This precedent was not unlearnt by the post-independence ruling regime, as it is intended to be shown in the next chapter.

7.1 Tanzania Mainland Under British Rule

Britain assumed responsibility over Tanganyika (Tanzania Mainland) first by way of conquest, with the German defeat in the First World War in 1914. Sir Horace Byatt was thereby appointed to rule the war-torn colony more or less under marshal law between 1914

and 1918.[1] His priority was reconstruction of the collapsed infrastructure, and encouraging "peasant agriculture to replace disrupted German plantations.[2]

Thereafter The Treaty of Peace With Germany was concluded at Versailles on 28 June, 1919.[3] Its article 119 pronounced Germany's renunciation "in favour of the Principal Allied and Associated powers [of] all her rights and titles over her overseas possessions". These lands having fallen in the hands of the said allied Nations were thereby entrusted in the care of the concurrently formed League of Nations. This World organisation on its part mandated the same to administering powers from within the membership of the League, on the basis that the inhabitants thereof were "peoples not yet able to stand by themselves under the strenous conditions of the modern world".[4] Indeed the people of these former German colonies could not be left to govern themselves! That would have been to turn the clock backwards, as they had already been plunged into the international market economy. The process of the export of finance capital to Africa as translated at the political plane by the colonial system, was a desirable ideal to most of the principal allied Nations that signed the Peace Treaty at Versailles.[5] The Mandate over the administration of Tanganyika was thus granted to Britain.[6]

Being merely a mandatory power, theoretically Britain was supposed to rule the Territory as an agent of the League of Nations under conditions imposed by the latter,[7] including the guarantee of inter alia:

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1 Cole and Dennison, 1964:6.

2 Coulson, 1982:94, Chapter 11, relying on Batyes, 1957.

3 Versailles, 1919. Also see Temperley, 1920; Chidzero, 1961.

4 Article 22 of the LON, 1919. According to Chidzero, "International Trusteeship charged as a product of the workings of international politics... it was a convenient means of disposing territorial spoils of wars." Chidzero: 1961:25.

5 The Principal Allied Nations, that signed the Peace Treaty were the United States of America. The British Empire, France, Italy and Japan. All were practising Imperial powers, either through direct colonial occupation and administration of foreign lands or at least by the export of finance capital.

6 To be administered under Article 22(5) of LON, 1919. See TMFEA, 1919, Chidzero, 1961:23-35.

7 The League of Nations' Mandate over Tanganyika was the second type involving central African territories. The first involved communities formerly belonging to the Turkish Empire, which by virtue of their relatively advanced development were

> "freedom of conscience or religion, subject only to the maintenance of public order and morale, the prohibition of abuses such as the slave-trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military training of the natives for other than police purposes and the defence of territory ..."[1]

Contrary to usual generalisations to the reverse, it is interesting to note the presence of some guarantee of certain human rights, albeit minimal, demanded of the British colonial authorities.

It would have been surprising for the British colonial government to adhere to the human rights provisions stated above. In fact it is recorded that they had little respect of the League of Nations' Mandate itself.[2] Actually they are said to have accepted the same late in 1922.[3] By then they had already installed a civil administrator from as far back as 31 January 1920,[4] and legislated for the Territory by the declaration of the Tanganyika Order in Council 1920.[5] The latter was made under the Foreign jurisdiction Act 1890. It cannot be disputed that Britain had set itself to rule Tanganyika in the same manner and degree like that of any other Protectorates in East African and elsewhere.[6]

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given provisional independence. And the third related to South West Africa (Namibia) and certain Pacific islands, "which owing to the sparseness of their population, or small size or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory ...", were to be directly administered under the laws of the latter.

1 Article 22 of LON, 1919. See the literature on this namely LON, 1945; LON, 1922; Chidzero, 1961; Chowdhuri, 1955; Hall, 1948; Leubuscher; 1944; Macaulay, 1937; Wright, 1930; Zimmern , 1926; Bentwich, 1946; Hales, 1937; Lewis, 1923; Lugard, 1923; Potter, 1922; Rappard, 1946; and Wright, 1924.

2 According to Hall, 1948:8 as referred in Chidzero, 1961:26, humanitarian ideas were not decisive although they played some definite role.

3 Cole and Dennison, 1964:7. We are brought to the attention of the fact that by virtue of art.1 of the Tanganyika Order in Council 1920, present day Burundi and Rwanda had remained within Tanganyika under the British administration, until 1922 when the mandate in respect of them was granted to and accepted by Belgium in recognition of her part in the defeat of the Germans in East Africa.

4 Ibid.

5 S.1. 1920 No.1583 proclaimed on 25 September 1920. See SROSI, 1950:266-288. See also the text in RLT, 1928:6.

6 Morris and Read, 1972:6. Also the Preamble to the Tanganyika Order in Council 1920, ("Whereas by treaty, capitalisation, grant, usage, sufferance and other lawful means his majesty has power and jurisdiction within the said territories (hereinafter called Tanganyika Territory"): see Cole and Dennison, 1964:7; Also see Chidzero, 1961:1-2; Hall, 1948:93 and Cameron, 1939:20

This was to be done in spite of the controversy, as to the legality of Britain to conduct direct native administration in Her Protectorates on the authority of the Foreign Jurisdiction Acts.[1] That without prejudice to the ambiguity following the use of the phrase 'protectorate'[2] it had been previously pointed out that the original intent of Foreign Jurisdiction Acts was limited to "a strictly extra-territorial jurisdiction limited to her own subjects". That the said statutes did not, "assimilate the jurisdiction exercised in a foreign country, either in nature or degree, to that which belongs to the Crown in a conquered country."[3] Nevertheless the above interpretation had to give way to the demands of socio-economic realities of the late 19th Century seen within the circumstances of the scramble for Africa.

It was thus within those premises that Britain decided to make no distinction, the wording of statute notwithstanding, between conquered and ceded territories on the one hand and protectorates on the other, as far as colonial administration was concerned. This rule of administrative convenience was later supported by case law.[4] It is within the context of the above-mentioned rule that Tanzania came to be ruled directly by Britain, in total neglect of most of the conditions as set out by the League of Nations in the specific Mandate Agreement.[5] That remained the state of affairs even after the institution of the Trusteeship system twenty four years thereafter.[6]

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1 See Morris and Read, Ibid: Chapter 2.

2 According to Morris and Read in Ibid:42, it is generally meant to imply, "a situation in which the indigenous authorities enjoy the protection of a foreign power, retaining nevertheless, a substantial degree of their autonomy, even though a large measure of this may have been called". But he refers to Roberts-Wray, 1966:48, as indicating that the phrase is, "somewhat indefinite or rather perhaps it may be said to have different meanings in different circumstances in the mouths of different people".

3 Hall,1894, as cited in Ibid:47.

4 See R. v.*The Earl of Crewe, ex parte Sekgone* [1920] 2 KB 576, *Sobhuza II v. Miller* [1926] AC 518; *and Nyali Ltd. v. Attorney General* [1956] Q.B.1.

5 Note Chidzero's view which is not supported by this thesis; the British Trusteeship policy which adhered to the doctrine of "paramountcy of native interests" in the process of preparing them for future self-government. It is emphasised here the mere fact that self-determination which the colonial governments invariably suppressed by armed force if necessary, defeats Chidzero's argument. See Chidzero, 1961:13-14.

6 The Mandate system collapsed with the termination of the League of Nations on 18 April 1946. See "Commonwealth and other Territories", HSE, 1968:584.

The latter system was established under Chapter XII of the Charter of the United Nations (art.75). It was to apply to among others, territories which hitherto were under the mandate system (art.77(1)(a)). Actually the former Mandatory Powers were to set up the terms thereby comprised, only subject to the approval of the UN Security Council through the instrumentality of the UNGA and the Trusteeship Council (arts.79, 83, 85). There were also certain duties and responsibilities the charter imposed to the potential administering authorities (art.81).

These included inter alia, the duty to submit periodic reports for consideration by the Trusteeship council, as would be duly authorised by the UNGA (art.87(a0). Apart from that they were supposed to agree to the taking place of periodic visits in their respective territories of the performance of its function of examining petitions from trust territories, as would be accepted and dealt with by the Trusteeship Council (art 87(b)). Ironically the membership of the latter included representatives of each country appointed to be administrative authority of a Trust Territory (art. 86(1)). This vitiated the objectivity in the body's supervisory and quasi-judicial functions, especially as regard the consideration of periodic reports and hearing of petitions.[1]

The British government's draft Trusteeship Agreement for Tanganyika,[2] was submitted to the UNGA and was approved on 13 December 1946.[3] This was to become the new legal basis for Britain's continuing jurisdiction over Tanganyika, as would be supplemented by the Mandated and Trust Territories Act of 1947.[4] Article 1 of the Agreement generally adopted the description of the borders of Tanganyika, as had appeared in the British Mandate for East Africa discussed above.[5] Then the British government, after having been designated as administrative authority (art.20),

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1 However, Chidzero has noted that: "the institutionalisation of the concept of international accountability for the administration of colonial territories was an important landmark in the history of international politics ..." Chidzero, 1961:27

2 The first draft of the terms of the Trusteeship for Tanganyika was published in June 1946 in Cmd.6840, and thereafter the revised version thereof was also published in October 1946 in Cmd. 6935, the latter being the one which was submitted to the UNGA for approval.

3 See TTA, 1946.

4 11 & 12 Geo. 6 c 8. See "Commonwealth and other Territories", 1968:252. This was an Act to make provision for the application and modification of laws which had previously been made under the Mandate system, intended to save them and then allow their modification by later legislation as situations would permit.

5 As had been rectified in respect of the common borders with present day Rwanda and Burundi. See ABT, 1934.

committed Herself to the achievement of the basic objectives of the International Trusteeship System. She further undertook to collaborate with the UNGA and the Trusteeship Council in their functions under article 87 of the UN Charter.

According to the discussion above, the supremacy of the UN system in this regard could not be questioned. Indeed the power to legislate, administer and rule the Territory, and the conduct of all economic and military ventures were expressly subjected to the Charter of the United Nations and the Trusteeship Agreement.[1] Furthermore as far as the creation of democratic institutions is concerned, article 6 thereof did not mince words when it provided that the "Administering Authority shall promote the development of free political institutions suited for Tanganyika"[2] The Administering Authority undertook to apply to Tanganyika, "any international conventions and recommendations already existing", including the Universal Declaration of Human Rights earlier discussed in this work.

Therefore on the basis of the Charter of the United Nations and the Trusteeship Agreement, it cannot be doubted that there existed in Tanganyika during the period of British rule, a sufficient legal framework from which the latter could have inspired at least a semi-democratic and people-oriented system of governance. But the forces of capitalist production would not permit. At the socio-political level the same were translated in a system of colonial governance demanding for the institution of instruments of coercion invariably enshrined with an aura of legal legitimacy. Let us now look at some instances of such institutions in the following sections, and we go back to the beginning of the period in 1920. The key question involved is why with such a foregoing background nothing was done to promote human rights and democratic culture.

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1 See article 5 of TTA, 1946.

2 The article further stated. "To this end, the Administering Authority shall assure to the inhabitants of Tanganyika a progressively increasing share in the administrative and other services of the Territory, shall develop the participation of the inhabitants of Tanganyika in Advisory and legislative bodies and in the government of the Territory, both central and local, as may be appropriate to the particular circumstances of the Territory and its people; and shall *take appropriate measures with a view to the political advancement of the inhabitants of Tanganyika in accordance with Article 76(b) of the United Nations Charter*". Added emphasis.

7.2 Executive Powers and the Role of the Governor

The Tanganyika Order in Council 1920 was modelled on legislation then commonly used in British Overseas territories. Orders in Council are made by the King as advised by the Privy Council,[1] in His capacity as conqueror or otherwise of the particular territories in question. Indeed the same had the significance of reserving or guaranteeing the residual powers and control by the British government in the Crown, irrespective of the existence of locally established institutions. This law created the basic institutions of colonial administration. It created the office of the Governor and Commander-in-Chief, to rule the Territory at the pleasure of His Majesty the King, (s.4) as assisted by the Executive Council established by section 6. The powers of the Governor were enormous, only subjected in very rare cases to the approval of the Secretary of State.[2] The following description of the Governor is worth noting, thus:

> "he is at once a representative of the King and the head of an executive government. In one capacity, he is above politics, in the other he is the framer and enforcer of all policies. If the people whom he is governing consider his policies unjust no other action is open to them but protest... it is ... a replica in miniature of the state of affairs before the civil war in England. Colonial governors have inherited the divine right of kings."[3]

Otherwise he had power to demarcate Provinces and Districts (s.7). But more significant to the most basic right of the indigenous rural populations was the declaration that all land in the Territory was public lands vested in the Governor in trust for His Majesty the King (s.8). Indeed, by the stroke of print, the Governor had become the biggest and most powerful landlord in the country capable of making grants of land at his pleasure.

Even after the coming into effect of the League of Nations Mandate, the Land Ordinance 1923,[4] did not at first have any provision to protect the landed rights of the

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1 In the colonial context they were made on the advice of the Governor of the day.
2 Morris and Read, 1972:6.
3 Ibid., quoting in footnote 10 from Huxley, 1935:234.
4 Cap.113 of RLT, 1965.

indigenous populations of Tanganyika. This was in contravention of article 22 of League of Nations. The radical title in land so vested in the governor, was to be disposed of in the form of what is known as "granted right of occupancy" of the maximum period of 99 years.[1] The terms and conditions for the grants were explicitly provided for both in law[2] and on the government certificate thereof.[3] There was nothing in statutory law which would prevent the Governor from alienating all productive land to European settlers.[4]

It was only in 1926 after some queries from a visiting League of Nations mission that the definition of the term "right of occupancy" was amended to include, "a title of a native or native community lawfully using or occupying land in accordance with native law and custom".[5] This created tenure known as "deemed right of occupancy."[6] It should be noted that the above amendment did not mean that the colonial government had acknowledged the superiority of the League of Nations Mandate, as far as their laws and policies in the Territory were concerned. Indeed subsequent legislation did not seem to make any particular reference to the latter.[7]

The Governor was the chief employer of all public servants, only subject to the directions of the Secretary of State, capable of prescribing duties, let alone creating offices,[8] and he could suspend and terminate them at will.[9] Other powers of enormous intensity, included the discretion to grant pardon of convicted criminals, (s.11) the discretion to confirm death sentences, (s.29) and the powers of deportation of prisoners and political offenders,[10] from the places of original domicile of the latter, to some other places within the

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1 Section 6 of Ibid.

2 See Land Regulations of 1948.

3 Shivji, 1994:3.

4 It should be noted that the Empire Settlement Act 1922, which provided for government financial assistance to facilitate Her citizens' migrations and settlement in British Overseas Dominions, was expressly intended to cover Mandated Territories. See 1922:12 & 13 Geo. 5c. 13, s.194).

5 Section 2 of the Land Ordinance.

6 Shivji, 1994.

7 Cole and Dennison, 1964:7, footnote 10.

8 Section 10 of the Tanganyika Order in Council 1920.

9 Ibid.

10 Section 33 of Ibid.

Territory, or any other place within the British Empire (s.33). It should be noted that most of these powers are still enjoyed by the President under the present Tanzanian Constitution.[1]

7.2.1. A Colonial Model of Government

The structure of British colonial administration in Tanganyika was essentially pyramidal,[2] the top most spot occupied by the Governor. Usually appointed from another Territory, the governor was meant to rule with an aura of unrestricted grandiose, within an unlimited avenue of the exercise of autocratic and personalised power. The change of Governor often meant as well a substantial variation of territorial policies.[3] He was indeed the chief executive, being the chairman of the Executive Council, the law maker, [4] as well as the chief enforcer thereof. This rendered irrelevant the doctrine of separation of powers well known to the British. In his day to day duties, the Governor was assisted by the Secretariat under the Chief or Colonial Secretary.[5]

Down the ladder were Provincial Commissioners, and at the base District officers or Commissioners. Whereas the task of Provincial Commissioners was in the main co-ordination of the work of the several District Commissioners under them it was the latter who were the foundation of colonial administration. Indeed because of the remoteness of most of the districts and the Territory's poor communication system, these were the real powers at grassroots level. They enjoyed a lot of "freehand" to develop their districts as they wished". They did everything including, maintenance of law and order, revenue collection, performance of statutory duties in respect of township authorities, registration of marriages, acting as agents of the Administrator-General, performance of judicial duties, and generally effecting native administration through on the spot follow up and constant supervision of the

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1 See infra, Chapter Ten.

2 The colonial Administration Service was in effect established in 1933. See Cole and Dennison, 1974:11. Jeffries, 1972:9, mentions 1930.

3 Cole and Dennison, 1974:16.

4 See 7.3 infra.

5 Morris and Read 1972:16-17.

local chiefs and other officials.[1] It should also be noted that the above powers were inherited intact by the post-independence District Commissioners.

One sees a system based on personalised non-democratic institutions. Apart from the regular Provincial Commissioners Conferences mentioned by Morris,[2] which was actually a talking club for the exchange of experiences, the rest is a scenario of a one-way traffic, with policies being imposed from the top to the basement of the administrative pyramid. Briefly stated, there was absolutely non-existence of representative organs, not even for the interests of non-natives. But of more significance to this work, is the fact that some negative administrative structures, have indeed been responsible for the enhancement and development of the anti-democratic culture to the prejudice of human rights. Yet British colonial rule in Tanganyika unlike that of the German, was particularly characterised by a commitment towards the development of a body of written law, on the basis of which the whole colonial policy would be effected, indeed for every main policy action, there would be enacted some statute to effect it. Thus as most colonial policies were in themselves inherently oppressive, discriminatory as well as coercive, the laws which followed them were bound to adapt to the same colour.

7.3. The Colonial Legislative Process

Originally the legislative authority over Tanganyika was in the Governor.[3] He actively exercised the power by enacting about 180 Ordinances between 1920 and 1926.[4] However by virtue of the Tanganyika (Legislative Council) Order in council 1926,[5] this power was extended to the Legislative Council (LEGCO).[6] The LEGCO was to be

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1 Ibid: 18-20.
2 Ibid:18.
3 Repealed s.13 of the Tanganyika order in council, 1920.
4 Cole and Dennison, 1974:39.
5 SR & O. 1926 No.991. See SROSI, 1950:278-280.
6 The Governor became only part of the process, having to assent to the Bills passed by the Legislative Council.

constituted by the Governor, and specified numbers of Official and Unofficial Members.[1] It was specifically mentioned that some members of the Executive Council would sit in the LEGCO as Official Members. These included the Chief Secretary, and Members holding the portfolios of law and Order; Finance, Trade and Economics; Agriculture and Natural Resources; Education; Labour and Social Welfare; Lands and Mines; and African Affairs, all of whom were known as Ex-official Members (art.VI(a)). Moreover, it was possible for the Governor to nominate to the LEGCO Nominated Official Members, who were persons in the service of the Crown in Tanganyika but outside the Executive Council (art.VI(b)).

On the other hand, Unofficial Members were supposed to be "such persons not holding office of emolument under the Crown in the Territory as the governor may from time to time by Instrument under the Public Seal appoint", (art.VII)) for a term of five years unless otherwise extended. (art.VII(2)) From the above provisions, one sees that the extension of legislative power from the monopoly of the Governor to the LEGCO, had nothing to do neither with democratic process nor representative government.[2] Neither was it suggestive of the distancing of the Governor from the Centre of the whole activity.

Thus apart from sitting in the LEGCO as its President,[3] he was the appointing authority of all its Members. The doctrine of Separation of powers had no place in this set up. Indeed, in their legislative activities within the ambit of the LEGCO, all Members were administratively answerable to the Governor in all respects. After all they were supposed to hold their seats at the pleasure of His Majesty.[4] The mere fact that Unofficial Members were not part of the government, cannot be said to have sufficiently brought about any objectivity

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1 Article V of the Tanganyika (Legislative Council) Order in Council 1926. The original number thereby specified in 1926 was 13 Members and 10 Unofficial Members. Article V was later substituted by SR & O 1945 No.1371, to provide for 15 Official Members and 14 Unofficial Members.

2 Cole and Dennison have noted that the 7 Unofficial Members originally appointed by the Governor in 1926, were warned to the effect that their appointment was not intended to represent any particular localities and interests. See Cole and Dennison, 1974:39.

3 He continued to do so until 1953, when it was provided for the first time, the appointment of the Speaker of the LEGCO following the recommendations of the Committee on Constitutional Reform. See Cole and Dennison, 1974:41, referring to S.I. 1953 No 1208.

4 Article VIIA as was substituted by S.I. 1948 No.105.

in the colonial law-making process. And yet the Governor reserved the discretion of the tenure of each Member's seat, which he could exercise through suspension or termination thereof. (art.VIIC(3) & (4)) And to make it worse, all questions relating to the membership of the LEGCO were restricted to the governor's determination as advised by the Executive Council, (art.VIID) implying the absolute eclipse of the unofficial section of the LEGCO by its Executive wing.

But more significantly was the inferior role the LEGCO played in the law-making procedure itself. its role was merely advisory, the actual law-making authority remaining with the Governor.[1] Furthermore it was expressly provided that no law would take effect without the assent of the Governor on behalf of His Majesty, or that of the latter through the Secretary of state. (arts.XIV, XV, XVI, VII) But of more importance was the absence of any provision empowering the LEGCO by special majority to override refusals or withdrawals of executive assent. This deprived it of any semblance of democratic law-making.

It should be emphasised that the LEGCO was not in any way one separate part of the Tanganyika Legislature.[2] It was a continuation of the monolithic colonial administrative structure, as was extended into the law-making sphere. Therefore as this fundamental structure of the subservient relationship of the LEGCO vis a vis the Governor remained intact throughout the British colonial period, the subsequent appointment thereto of Members from the indigenous populations, was meaningless. Indeed executive control of legislative process by the Governor or in some instances the Secretary of state through the Colonial Office in London, was common in British colonial practice, particularly over matters affecting the African population.[3] It is thus in the light of the foregoing that one can

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1 The said laws had to indicate that they were Ordinances made by the "Governor of Tanganyika by the advice and consent of the Legislative council thereof" (art.XIV).

2 Note that Cole and Dennison have suggested that the LEGCO was one part of the Legislature, which is indeed the elevation of the institution beyond its real status. See Cole and Dennison, 1974:41.

3 For a detailed account of how the system operated see Palley, 1966:110-154, Chapters 6 and 7.

understand the coercive and oppressive characteristics of most of the laws made during the period.

7.4 The Laws Applicable

The law application in the Territory was expressly set out from the outset in the Tanganyika Order in Council 1920, most of which was received law. By section 17(2) which is known as the reception clause, in civil and criminal jurisdiction, the law of the land also included some Indian codes as relating to civil and criminal procedure and penal law. Otherwise by the phrase "other laws which are in force in the Territory at the date of commencement of this Order or may hereinafter be applied or enacted", it was intended to save the few pieces of legislation the Germans enacted particularly as relating to land rights, and any other legislation which would thereafter be promulgated by the new colonial regime. And to cap it all the said written law would apply and be exercised; "in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England at the date of this Order ..."

Briefly stated, this was indeed the emplantment of English law, practice and principles unto a people and socio-political environment of Tanganyika, without subjecting the same to the existing law and customs of the latter. Actually to the contrary, section 24 of the Tanganyika Order in Council 1920, only requested the courts when dealing with cases where natives were parties, to recognise the existence of native law and be guided by it. But this would only be possible when the same was not "repugnant to justice and morality or inconsistent with any Order in Council or Ordinance or any Regulation or Rule made under any Order in Council or ordinance".

It cannot be debated that the repugnance clause cited above contravened the substance of the Covenant of the League of Nations.[1] The ideal position would have required section 17(2) of the Order in Council 1920 mentioned above, to subject the written law applicable in the Mandated Territory to the substance of the law and customs of the indigenous people. Yet the socio-economic system which ensued out of the colonial invasion, necessarily required the support of a legal regime which, both in substance and form, would be alien to the interests of the people. It mattered not whether such conquest came about by armed conflict, treaty, capitulation or otherwise by the modalities of diplomacy through the League of Nations.

To make it worse, the English law which was imported for the above-mentioned purposes was a brand which was made to lose, "most safeguards and control mechanisms which, in theory at least, it possessed in England".[2] It was indeed as Professor Seidman calls it "a truncated, narrow law whose puristic theme was Contract unrestrained by either Welfare State legislation or democratic institutions".[3] Undoubtedly the only justification for the excision of democratic principles and safeguards during the transportation process to Africa was the fact that the colonial situation was supposed to be a civilising mission![4] It is only on that basis that law was made part of the colonial administrative process, for the purposes of the subjugation of the Tanganyikan indigenous people to perpetual colonial servitude, and hence for the coercive legislation which ensued.

It was for that matter that the Deportation Ordinance 1921,[5] the Expulsion of Undesirables Ordinance of 1930,[6] the Emergency Powers Orders in Council 1939-61,[7] the Witchcraft Ordinance 1928[8] and the Collective Punishment Ordinance,[9] appeared in the

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1 Supra.
2 Martin, 1974: 11.
3 Seidman, 1969.
4 See supra, Chapter Six.
5 Cap.38 of RLT, 1965.
6 Cap.39 of Ibid.
7 Originally promulgated in Kenya as Government Notice No.1102, but were applied to all East African British jurisdictions including the Tanganyika Trust Territory.
8 Cap.18 of RLT. 1965.
9 Cap.74 of Ibid.

Statute Book. These among others provided for extensive powers to the executive arm of state to invariably deny freedom of movement to the affected victims. The same could be said of the Newspapers Ordinance[1] and the Cinematography Ordinance,[2] which comprised stiff conditions rendering freedom of expression and the right to be informed a privilege rather than a right. As to the enjoyment of the right of association, the conditions imposed on the registration of societies as appeared in the Societies Ordinance,[3] were overtly indicative that the colonial authorities were determined to encroach upon the right as far as could be possible. It was feared that doing otherwise would have allowed the indigenous population to organise to overthrow the status quo.[4] But it was through the use of penal law to coerce labour that one could clearly see in action the use of law to effect colonial domination.

7.4.1 Forced Labour and the Use of Penal Law

There is no dispute that colonialism being one form of imperialism, had as the system's main interest, striving for super profits, by the exploitation of the labour of the colonised people.[5] This was effected through what has been described as the system of semi-proletarianisation. This meant the drawing of peasant populations of the colony into the capitalist commodity economy, without any interest of going all the way into the establishment of full-fledged capitalist relations. Therefore while "imperialist capital could not afford to destroy the pre-capitalist modes;... it partially conserved these modes which 'subsidised' capital and allowed it to draw super profits."[6] Thus unlike in a purely capitalist situation, the Tanganyikan producer was not made to depend on his wages for his subsistence, but was only forced to cheaply sell labour on a temporary basis, while remaining attached to his peasant environment. Briefly stated what the imperialist state under the colonial system did was only to "disarticulate the existing modes (most of which had not

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1 Cap.229 of ibid.
2 Cap.337 of ibid.
3 Note that Societies Ordinance, 1954 was enacted the same year the first official political party was established. See infra, Chapter Eight.
4 See Shivji, 1982.
5 Ibid: 41.
6 Ibid.

reached the stage of feudalism in Tanganyika) destroyed self-sufficiency of the producer and integrated him in the commodity-circuits of the metropolitan capitalist system".

Indeed for the above process to materialise state coercion was *sine qua non*. Thus force was first used by the colonial state "to divorce the producer from his means of production.. to offer himself to capital". In Tanganyika, in order to forcibly induce the indigenous peasant to embark on capitalist labour-hungry projects such as European plantation agriculture, communal labour or even compulsory requisitioning and conscription, indirect methods were applied. Taxation was the most significant. A system of Hut and Poll tax, originally a German introduction, was adopted by the Hut and Poll Tax Ordinance 1922.[1] This law compelled all adult members of the indigenous populations to leave their homes for the purposes of seeking work in far away places.

There are certain features which made the Hut and Poll Tax system one of the most draconian measures in colonial native administration. First was the fact that it was discriminatory because the law did not apply to non-natives, targeting only the source of labour.[2] Secondly was the fact that the whole regime was tied to forced labour and criminal sanctions. The tax not being based on the valuation of one's property and capacity to pay, every able-bodied person of the required age had to pay it either in cash or in the form of labour by working with any "government undertaking or any essential public works and services authorised by the government". Failure to do so attracted conviction for a criminal offence punishable by three months' imprisonment.[3] That sort of labour would never pass the test of the ILO conventions to which Britain was party.

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1 Ibid:42.

2 Exempting even in the case of natives military and police personnel, chiefs, liwalis and jumbes and destitute and disabled persons and old people. See s.79(3) of the Hut and Poll Tax Ordinance 1922. Otherwise town dwellers who were in the main non-natives were subject of the House Tax Ordinance, No.26 of 1922, a different regime altogether.

3 Section 9(1) of the Hut and Poll Tax Ordinance 1922. See Ibid: 44.

The system was inhuman as it subjected the native going without a tax ticket to a constant state of fear, insecurity and apprehension of being whisked away from his family to be physically enslaved in satisfaction of an obligation about which he had no idea! This compulsion led to the establishment of what is known as the system of migrant labour, whereby adults from inland labour reservoir areas, were forcibly recruited to work in cash-growing regions of the Coast and the north eastern highlands. The system was demeaning, oppressive and harsh, as the following account puts it thus:

> "Thousands of men would leave their homes, families and land to travel to the centres of employment. They travelled on foot or packed like cattle in railway wagons or motor lorries, braving the harsh climate and hostile environment, rarely with full stomachs and often without shelter. On the way, some would work a few days for food, others would spend a few days either in the tic-infested huts of the rest camps or in dispensaries convalescing and finally arrive at their destinations starving, emaciated and most probably disease-ridden. The journey of this migrant labour to and from employment has been accurately likened by one historian to the middle eighteenth Century-passage of the slaves from Africa to the West Indies."[1]

Yet on the contrary the system of semi-proletarian labour had a lot of advantages to the colonial state, as one Secretary for Native Affairs once summarised thus:

> "(i) simplicity and cheapens, especially of social organisation, for types of work which will not stand any but the lowest scale of wages; (ii) the absence of any need for elaborate housing arrangement, medical organisation, and so on, due to the natural and therefore comparatively healthy [sic] living conditions of a great part of the labour force ... (iii) the relief of industry from the necessity of unemployed pay and many other factors of a fully organised labour dependent entirely on wages; (iv) the slowing, if not indeed the prevention, of the process commonly described as detribalisation and, perhaps most important, (v) the contentment of the labourers who work in conditions which to them are generally satisfactory."[2]

Indeed in order to support the procurement and continuance of the above-cited advantages, the government criminalised labour relations by the use of a system of penal sanctions

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1 Shivji, 1982:45, referring to Iliffe, 1979:308.
2 Mitchell, 1933:10, as quoted in ibid:48.

through written law. It was unashamedly impressed that "a moderate amount of punishment is good for most native servants, just as a moderate amount of fleas is good for a dog, (keeps him from brooding on being a dog)."[1]

Thus the Master and Native Servants Ordinance, [2] the law applying only to natives, comprised a wide range of criminal offences and penalties. These included among others, absence from work, (s.18(1)) absence without leave, (s.40(b)) intoxication while on duty, (s.40(c)) neglect or improper performance of duty (s.40(d)) and use of employer's property without leave (s.40(e)).[3]

Shivji has shown that the conviction for desertions and absenteeism overwhelmingly outnumbered those for all other offences added together. This can just explain two things. First that the labour involved was forced under unbearable conditions. And secondly that desertion was by then the only right a semi-proletarian labourer was availed. The same was effectively exercised, the existence of the coercive organs of state notwithstanding. However, the right to desert was mere individualised reaction against a system which supported the draconian migrant labour regime. Thus when the post-World War II situation created conditions necessitating permanent labour relations leading to the birth of the working class, the same gave way to the exercise of collective action as was limited and regulated by the Trade (Arbitration Inquiry) Ordinance 1947,[4] and the Trade Unions Ordinance 1953.[5]

Nevertheless, it should be emphasised that although the semi-proletarian labour by the mid-fifties had substantially given way to permanent labour relations, the effects of the criminal regime which had supported it did not go with it. The same continued to influence both the content and culture of labour relations in Tanzania Mainland.

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1 Shivji, supra:50-1.
2 No.32 of 1932.
3 Shivji, 1982:53, Table 2.2.
4 No.11 of 1947.
5 Cap.32 of RLT, 1947.

7.5 Indirect Rule and the Co-option for Grassroots Native Political Institutions

There is one thing which makes the British colonial rule in Tanganyika a departure from its predecessor regime under the Germans. One writer has noted the difference as being the fact that British colonial policy was "a combination of the highest principles on the one hand, and a constant tendency to resort to immediate measures dictated by expediency only on the other.[1] In the section above it has been illustrated how economic expediency led to the colonial law and practice of semi-proletarian labour relations. However contemporaneously the British Colonial government was able to effectively apply a colonial ideology of indirect rule.

The system had originally been coined by Lord Lugard from his experience of British administration in Nigeria for two periods between 1898 to 1906, and 1912 and 1919.[2] It was Sir Donald Cameron as governor of Tanganyika from 1925, who institutionalised the policy in the Territory, himself a "passionate" believer thereof.[3] According to him, indirect rule was supposed to work by:

> " .. adopting for the purposes of local government the institution which the native peoples have evolved for themselves, so that they may develop in constitutional manner from their own part, guided and restrained by the traditions and sanctions which they inherited (moulded or modified as may be on the advice of British officers) and by the advice and control of the officers."[4]

It was as if the main objective of the policy was the economic and political welfare of the people of Tanganyika, inviting them to participate in their own ways and ideals in the administration of the Territory at grassroots level.[5] However one sees at the outset that the mischief which the policy intended to cure was the potential native resistance against

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1 Chidzero, 1961:11.

2 See Lugard, 1965. It is said that the real roots of this policy lay in the British administration in India in the 18th Century. See Coulson, 1982:94, Chapter:11.

3 See Coulson, Ibid.

4 Cameron, 1930, as cited in Morris and Read, 1972:3. For a similar definition of indirect rule see Chidzero, 1961:16.

5 See Morris and Read , Ibid, for the main objectives of indirect Rule as were copied from a Confidential Despatch of 17 February 1927, C.O. 691/88/18087 and D.S.A. 1126.

colonial rule, having learnt from the earlier German experience.[1] This policy was a vehicle for enforcing the other colonial ruling practice of "divide and rule". It was in effect a smoke screen political ideology intended to capture the already timid local rulers to their side, while exercising direct control of native administration through the instrumentality of the District Commissioners as we have already shown in this chapter.

For that matter local chiefs were obliged to operate as mere agents of the colonial regime, the latter reserving the right, which they often exercised, of removing and replacing those they thought failed in that regard, "regardless of the legitimacy of their claims as chiefs."[2] Unequivocally the point was underscored that real power always remained with the British.[3]

In actual fact not even Cameron did anything measuring towards the enhancement of the said good intentions of indirect rule. It has been pointed out that when it came for Cameron to choose as between the interests of the European settlers and those of the natives, he always sided with the former.[4] Moreover he was against unrestricted native co-operative organisations.[5] If indirect rule were to have anything with the native population's political emancipation, Africans should have been right from the beginning at least appointed to the LEGCO and the Executive Council, not mentioning responsible government positions. This was not the case under British rule,[6] the requirements of the Mandate and the Trusteeship Agreements notwithstanding.

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1 Chidzero rightly notes as the objectives of the policy (a) expedience as it was adopted as a cheapest and easy method of local administration; (b) for winning the loyalty of native chiefs; (c) as effective method of native administration for easily being understood. Chidzero, 1961:18.

2 Cole and Dennison, 1974:95.

3 See Austen, 1968.

4 See Rodgers, 1974, as cited in Cole and Dennison, 1974:95.

5 Cole and Dennison, Ibid.

6 See Alive, 1973a.

However indirect rule never succeeded to cheat the people of Tanganyika out of their struggle for self-determination. At worst it arrested and delayed parliamentary and/or self rule and interfered with the development of effective local government in Tanzania, contrary to the letter of the relevant provisions of the Covenant of the League of Nations, and thereafter the Trusteeship Agreement.[1] However the very use of traditional rulers against the interest of their people, facilitated the success of a broad mass-oriented nationalist movement, unhampered by local interests.[2] Yet the culture of ruling from above through local agents, in total disregard of democratic grassroots organisations, had already entrenched itself in the Tanzanian political discourse.

7.6 Conclusion

In the last two chapters an attempt was made to trace the history of rights struggles of the people of Tanzania Mainland, in the context of the country's early constitutional development. The historical roots of some of the negative factors which have substantially influenced the post-independence constitutional order were-elucidated. It has been underscored that the people of Tanzania Mainland were never passive victims of oppressive regimes be they local or foreign, as the specific accounts of national resistance have indicated. Moreover it has been shown how the culture of resistance against oppressive regimes was replaced by that of general timidity, following the brutal suppression of the Maji Maji war of liberation between 1905 and 1907. The political and organisational significance this large-scale mass-oriented military campaign had on the subsequent struggle for national independence will also be discussed in the next Part. And lastly, the two chapters dwelt at length with some aspects of the two colonial regimes, trying to locate the real roots of the anti-democratic legacy, which it shall be concluded is the worst impediment to the smooth development of a human rights culture in the country.

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1 Supra. See Chidzero, 1961:18.

2 See infra, Chapter Eight as to the generally united pre-independence nationalist movement.

CHAPTER EIGHT

Human Rights and Constitution-Making 1961-1984

8.0 Introduction

It has already been mentioned that Tanzania never had a Bill of Rights in her Constitution until 1984. This chapter examines how the Bill of rights question was dealt with within the context of the constitution-making process, immediately before and after independence in Tanzania Mainland. It is argued that institutions of governance established by the post-independence regime, continued to be used for various reasons against people's freedom and grassroots organisations. This is seen as having been the cause for the exclusion of the Bill of Rights. The omission led to the unchallenged monopolisation by the state of all political activity under the single-party system. The unfortunate result was the development in the country of an anti and undemocratic culture, which must be addressed by any genuine legal and political reforms for wider democracy.

8.1 Nationalist Victory and the Early Post-Independence Constitutions 1961-1965

It cannot be denied that the anti-colonial struggle as was spearheaded by the Tanganyika African National Union (TANU) was comparatively short and uneventful.[1] It was made easier by some earlier developments in the country.[2] TANU had been formed only seven years before independence on 7 July 1954. It emerged out of an already mature mass-

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1 Comparison is made to bloody anti-colonial struggles of the time like that of Kenya and faction-ridden situations like those of Uganda, Rwanda, Burundi and Zaire. According to Chidzero, the "difference between Britain's gradualist policy and Her qualified franchise proposals and the United Nation's support for self-government in shortest possible time and on the basis of universal franchise, ... greatly [increased] the activity, self-confidence, and determination of the African nationalist leaders". See Chidzero, 1961:251.

2 See supra, Chapter Six.

oriented nationalist protest against colonial rule, which at best just needed more organised leadership.[1]

First the establishment of TANU itself was the transformation into a fully-fledged political party of the Tanganyika African Association (TAA) which had existed and operated branches throughout the country.[2] Therefore with that advantage, TANU's efforts were directed to the correction of the weaknesses of its predecessor.[3]

Actually, in spite of its political inclinations TAA had essentially been a social welfare association of the few educated elite and enlightened urban dwellers.[4] These could easily be targeted and coerced out of their nationalistic ambitions by the colonial administration. On this the TANU transformed the movement into a mass-oriented crusade. It was able to appreciate the earlier practice of unified resistance of the people of Tanganyika. It also took advantage of the national cohesion provided by the promotion of *Kiswahili* as *lingua franca* for the whole Territory.

Thus it did not lake long for the political movement to engulf all other social and economic organisations touching upon indigenous Tanganyikans' interests. For example there may be disagreement in the relevant literature as to the exact extent of the involvement of the co-operative movement in nationalist politics.[5] But it is clear that TANU did forge a close alliance with the leadership of the movement. The fact that almost all the leadership of the co-operative movement at independence was co-opted into the government structures was posterior proof of the above contention.[6]

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1 Chidzero, 1961:196-7.

2 TAA had an estimated membership of 5,000. Ibid.

3 Chidzero says TAA members were "mostly teachers and African government employees", who were "... loosely organized, with no definite program." Chidzero, 1961: 196, citing Document F/1032, para 50.

4 By 1956 it had 100,000 members. See chidzero, 1961:197 citing the E.A.&R, 1956.

5 See Bennett, 1963:5, claiming that the co-operative and political movements were intermixed; and Ibid:184, arguing that the view that co-operative branches were TANU holding units is misleading.

6 Among the prominent ministers of the pre-independence Responsible Government of 1960, were Clement George Kahama and Paul Bomani, former leaders of the co-operative movement in Bukoba and Mwanza respectively.

The same efforts were made in the case of the Trade Union movement, actually making it possible for the leaders of the Tanganyika Federation of Labour, from 1958 to sit in the Executive Committee of TANU.[1]

The other aspect relevant to this work, was TANU's effective use of the Trusteeship Agreement.[2] There had been indeed United Nations Visiting Missions to Tanganyika in the years 1948, 1951, 1954 and 1957.[3] Thus for example during the 1954 Mission, TANU among other things "pressed for a timetable of steps to be taken, ... towards the goal of self-government". It was also emphasised in accordance with the Agreement that Tanganyika was not "a colonial possession of the United Kingdom", and that it was "asked that the flag of the United Nations be flown with the British flag, and that a United Nations office be established in Tanganyika with a branch in each of the eight provinces".[4]

This was only one of the many occasions TANU relied on Tanganyika's legal status under the UN system to pursue the nationalist cause. In 1956 and 1957, Julius Nyerere twice visited the UN Headquarters in New York, where he addressed the Fourth Committee of the UNGA on the first occasion, and on the second the UN Trusteeship Council.[5] The same opportunity was also afforded to several other Tanganyikans to press for specific demands.[6] This is an indication of the positive effects of the positivisation of human rights. That although as we pointed out in Chapter Seven that the British colonial government ignored the

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1 Kasilati, 1994:65. Frederick Masassi and Hon. Mzee Rashid M. Kawawa interviews.

2 Supra, Chapter Seven. Chidzero, 1961:23-35 at p.27. Chidzero remarks that the institutionalisation of accountability was "a factor which was henceforth bound to affect political developments" within the Trust Territories.

3 Maguire, 1969:180. See U.N. Documents T/218 (TCOR), 4th Sess. Suppl. 3; T/1032 (TCOR) 11 Sess., Supp. 3 and T/1169 (TCOR), 15th Sess. Supp.2.

4 Ibid. Even before the establishment of TANU, TAA and the Chagga Cultural Association had in 1951 submitted for the Visiting Mission's consideration, their proposal earlier rejected by the government, of having a majority of Africans in the LEGCO. Chidzero, 1961:196-7; also the speech by the founder of TANU in Kilimanjaro Region the late Alkaeli Mbowe reported in the UH, 1997.

5 During the second visit he was accompanied by Chief Thomas Marealle, whose address augmented the impact of Nyerere's petitions. See Chidzero, 1961:198-9.

6 Reference here is made to Kiliro Japhet who went to New York to urge against colonial arbitrary land alienation in Meruland contrary to the letter of the Trusteeship Agreement, and Chief Kidaha Makwaia.

limited human rights provisions in the Trusteeship Agreement and the United Nations Charter, that did not prevent the same to be excavated from cold storage by the nationalists.

8.1.1 The Bill of Rights and the Making of the Independence Constitution

It was pointed out in Chapter Three as to how the Universal Declaration of Human Rights of 1948 inspired among others, the decolonisation process. It cannot be disputed that the anti-colonial struggle for national independence was a human rights crusade. One author has described TANU's campaign for independence as "principled ... with a strong moral foundation", that is to say that:

> "Nyerere as a leader and ideologist, consistently re-asserted the basic principles of freedom and equality which he clearly saw as integral to the struggle for decolonisation. His Independence Message reminded TANU members that: 'we have based our struggle on our belief in the equality and dignity of all mankind and on the declaration of Human Rights".[1]

Indeed the main beliefs of TANU as were enshrined in its constitution, included an unequivocal commitment at least in theory, to the basic tenets of the liberal-democratic conception of human rights.

The issue is whether by the above assertion alone one may conclude that Nyerere, and therefore TANU, were indeed committed to human rights. The analysis following below attempts to answer this issue in the negative. As independence approached, it was becoming plain that Nyerere had in mind a human rights conception of his own, peculiar from the mainstream idea.

Thus according to Nyerere, freedom and development were intertwined in the egg-chicken fashion, having stated thus:

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[1] Read, 1995:127, citing Nyerere, 1967. For example, immediately after its formation in 1954, TANU rejected the slogan of "equal rights for all civilized men" generally expoused by Europeans in British East and Central Africa, and proposed instead, the slogan of "equal rights for all men." Chidzero, 1961: 197, citing the E.A. & R, 1957. Also Pratt, 1976:63-80, who argues that Nyerere's beliefs in equality and Fabian socialism "emerged from his own personal experience, his contemplation of the condition of his people and his religious faith".

"First there is national freedom, the ability of the citizens of Tanzania to determine their own future ... Second, there is freedom from hunger, disease and poverty. And third, there is personal freedom for the individual; that is, his right to live in dignity and equality with all others, his right to freedom of speech, freedom to participate in the making of all decisions which affect his life, and freedom from arbitrary arrest because he happens to annoy someone in authority - and so on. All these are aspects of freedom, and the citizens of Tanzania cannot be said to be truly free until all of them are assured".[1]

Although the above-quoted statement was made a few years after independence, it summed up in a nutshell the backbone of Nyerere's human rights philosophy which he maintained throughout his political career. The same involved the prioritisation of developmental needs of society over personal rights and freedoms.[2] Unfortunately the same engendered a political justification of the state to invariably encroach upon many rights of the individual.

It was indeed the basis for what Read has rightly described as "the (unfashionable) rejection of the Bill of Rights",[3] though it leaves only Nyerere to say when exactly he discussed the issue with the British government.[4] In the academic literature on this point, there exists the in-built but mistaken conviction that the inclusion of the Bill of Rights in the Tanganyika Independence Constitution, was demanded for by the British colonial regime, and successfully rejected by the nationalist leaders.[5] It is regrettable that none of the advocates of this allegation provides evidence to support it.

The record should thus be put straight that unlike in Her practice in the making of independence constitutions in other former colonies in Africa apart from Ghana,[6] in respect of Tanganyika Britain did not at any stage during the negotiation for independence, officially

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1 TANU Policy Document of 1968 reprinted in Nyerere, 1975, and cited by Ibid:128.

2 Nyerere, 199:30-31, Maluwa, 1997:66 calls it "the old argument". Also see Eze, 1990:87-106.

3 Read, 1995:127.

4 Efforts by this researcher to get the former President to reveal to that effect ended without success.

5 See among others, Peter, 1990:2; Peter, 1991:148; Mwaikusa, 1993:680. Notably the pioneer of the human rights academic debate in Tanzania Robert Martin, did not get involved in that confusion. See Martin, 1974:38-45.

6 Read, 1995:128, noting the influence of the 1957 Ghanaian practice on Nyerere's perception. See also Kalunga, 1981:286. Otherwise Bills of rights were included as a result of British pressure in independence constitutions. See among others: Nigeria (1960) Sierra Leone (1961), Uganda (1962), Kenya (1963), Zambia (1964), Zanzibar (1963) and much later Zimbabwe (1979).

raise the question of the Bill of Rights.[1] The evidence of this assertion is none other than the Report of the Constitutional Conference itself.[2] This has recently been confirmed by two pioneer nationalists Mzee Rashid Mfaume Kawawa the former Prime Minister and Vice-President and Clement George Kahama, the former Cabinet Minister and still Member of Parliament.[3] Apart from that a perusal of some Colonial Government Papers does not reveal any formal exchange on the Bill of Rights subject, between the British colonial Government and the pre-independence nationalists in Tanganyika.[4]

The Constitutional Conference was held in Karimjee Hall, Dar es Salaam from 27 to 29 March 1961, against the tradition of holding similar occasions in the Lancaster House, London.[5] This alone was indicative of the good relations that existed between the nationalists and the British government,[6] if not the absence of any serious controversies among all the concerned parties. It also confirmed the general support and control TANU enjoyed in the whole process.[7] The Tanganyika Delegation comprised 15 delegates including the Chief Minister Julius Nyerere,[8] and two British advisers. That of the United

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1 Recent interview with Mzee Rashid M. Kawawa and Mzee Clement George Kahama.

2 CO, 1961.

3 Kawawa says that the issue had been settled within the TANU Party itself, that the Bill of Rights should be rejected for being unnecessary in the circumstances of Tanganyika. According to him there were three arguments against the Bill of Rights: First that TANU had always believed in human rights and its Constitution aspired for the promotion thereof. Secondly that as Britain did not have one, they didn't see the compulsion to have the Bill of Rights in the Constitution of Tanganyika. Thirdly that TANU desired unqualified national unity in new Tanganyika and therefore was not ready to encourage any unnecessary conflicts in the young state.

4 See for example, RLO, Doc 1, RLO Doc 2, RLO, Doc 3, RLO, Doc 4 and RLO, Doc 5. I am grateful to my colleagues Bonaventure Rutinwa and Sifuni Mchome for doing this research at my request in England in March, 1997.

5 The earlier arrangement announced by the Governor on 11 October 1960 during the 36th Session of the LEGCO, was that it would be held in London. Kawawa says they were taken by surprise. They had already begun preparing for the London trip. Ref. Recent Interview . Pratt, 1976:55 says that the conference was held at the invitation to Dar es Salaam of the Colonial Secretary, by TANU.

6 Pratt calls it the "government's unintended support for TANU. See Pratt, 1976:24-35.

7 The peaceful and harmonious pace of constitutional advance in Tanganyika was acknowledged by Mr. Macleod, the Secretary of State for Colonies, in his speech at the official opening of the Tanganyika Constitutional Conference. See CO, 1961: 11, Ann. C. Also Chidzero 1960:275.

8 Other delegates were: Ernest Vasse, K.B.E., C.M.G. Minister of Finance, Chief A. S. Fundikira, Minister of Lands, Survey and Water, Hon. F.N.M. Bryceson, Minister of Health and Labour, Hon. C.G. Kahama, Minister for Home Affairs, Hon. A. H. Jamal, Minister of Communications, Power and Works, Hon. P. Bomani, Minister for Agriculture and Co-operative Development, Hon. A.Z. N. Swai, Minister of

Kingdom had 5 delegates including the Secretary of colonies The Rt. Hon. Ian Macleod, M.P.[1] and one legal adviser. The other parties included the governor Sir Richard Turnbull and his Secretariat.

The Conference was actually intended to deliberate and recommend on changes leading to the overthrow of the colonial constitutional order.[2] It followed the drastic constitutional changes made earlier with effect from 3 September 1960.[3] The changes had introduced some representative component of the then renamed Council of Ministers (formerly "executive council"). Although still presided by the Governor it then included 10 Ministers and Chief Minister, whose appointment to it depended on their being elected or nominated to the LEGCO.[4]

Furthermore the composition of the LEGCO had also been altered. It was made to comprise the Attorney General and Minister of Information Services as ex-officio Ministers[5] and 10 nominated Members. Others were elected Members from 55 constituencies.[6] Thus by the time of the Constitutional Conference, the LEGCO led by the Speaker (appointed from

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Commerce and Industry, Hon. O. S. Kambona, Minister of Education, Hon. R. M. Kawawa, Minister for Local Government and Housing and other five that is, Hon. Al Noor Kassum, Hon. I.M.B. Munanka, Hon. L. N. Sijaona, Hon. T.S. Tewa and Hon. R. S. Wambura. See Ibid:9.

1 Others from the Colonial Office were; Mr. W.B.L. Monson C.M.G., Mr. P. Rogers C.M.G., Mr. B.E. Rolfe and Mr. J.T.A. Howard-Drake. See Ibid.

2 Ibid: 11, Ann. C.

3 By virtue of the Tanganyika Order in Council, 1960, The Tanganyika (Legislative Council)(Amendment No.3) Order in Council, 1960 and the Tanganyika Royal Instructions 1960. See Pratt, 1976:50-55 as to the political tug of war between Nyerere and Governor Richard Turnbull about the changes towards responsible Government and how soon they would be effected.

4 The Chief Minister was to be an elected Member who appeared to command the support of the majority of the Members of the LEGCO.

5 Indicating how sensitive the colonial government was in relation to the dissemination of information as not to let the portfolio fall in the hands of an elected Member, lest the same be a TANU follower.

6 The Governor could direct that a constituency be represented by two or three elected members, specifying that the extra Member shall be an Asian or European, so that the Governor had to make sure that there were amongst the Members of the House, 11 Asians and 10 Europeans.

elected or nominated Members but not ex-officio), had 71 elected Members,[1] 2 ex-officio Members and 9 Nominated Members.[2] This made a total of 82, of whom 53 were Africans, 13 Asians and 16 Europeans.[3] The new constitutional arrangement was known as Responsible Government (*Madaraka*) although still it was the Governor who controlled the sensitive areas of the state, including external affairs, defence, the public service, internal security and the operation and control of the Police.[4]

The Conference which took only two days,[5] ended with agreement on all matters on the agenda.[6] It was thus agreed that Full Internal Self-Government be introduced by 1 May 1961, with full Independence fixed for 28 December 1961. This entailed the re-naming of the Council of Ministers as Cabinet, to be presided by the Prime Minister. It was to exclude from its membership the Governor and Deputy Governor. From then on the Governor's exercise of discretion on many matters was watered down, as he had to act in accordance with the advice of the Cabinet. As to the Legislature, it was proposed that it be referred to as the National Assembly instead of LEGCO.

If anything was controversial, were matters related to the public service. Protection was required for the expatriate members of the civil service in fear of the imminent mass Africanisation in the wake of Independence. But there was also agreement in this regard. Thus it was recommended the introduction of an independent civil service headed by the Civil Secretary instead of the Governor General. Also recommended was the creation of the Public Service Commission in respect of the general service, and the Judicial Service Commission and the Police Service Commision for the concerned services. Furthermore the

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1 Out of whom 50 were Africans, 11 Asians and 10 Europeans.

2 Out of whom 3 were Africans, 2 Asians and 4 Europeans.

3 This arrangement established what has been referred as "multi-racialism or partnership of races". Chidzero, 1961:20.

4 CO, 1961:1-2. Also Pratt, 1976:55-59 for the changes which followed Responsible Government.

5 It was the briefest of the many constitutional conferences in Britain's decolonisation process of the early sixties, according to J.K. Nyerere in his closing speech as Chief Minister. See Ibid: 16, Ann.H.

6 See the Final Communiqué. in Ibid: 17-18.

Tanganyika Delegation committed itself to the common services provided by the East Africa High Commission. It opened itself to future talks with the other partner states then still under British rule. The above recommendations were reflected in the Independence Constitution.

The absence of any mention of the Bill of Rights in the proceedings of the Tanganyika Constitutional Conference as has been elucidated above, may be explained in the following terms. First it was because of the peculiar legal status of the relationship between Britain and Tanganyika. Indeed Britain as the administration authority of Tanganyika did not exercise sovereignty over the territory.[1] Thus unlike in other British colonies in *strict sensu* like Kenya for example, in Tanganyika there was not sufficiently large British investment and settler community, capable of, either resisting or delaying the nationalist achievements of the majority of Africans.[2] Neither were they able to pressurise the British authorities to coerce a Bill of Rights.[3] Besides that the Tanganyika nationalist movement had attracted the confidence of the British Government. This resulted from the way it conducted itself, in a comparatively bloodless, peaceful way, largely employing civic methods coupled with Nyerere's charisma, personality and human rights rhetoric.[4] Britain was certainly positive about the sort of governance expected of the future independent Tanganyika as the following words of Mr. Macleod clearly illustrate, thus:

> "I think in the ordinary run of these things it would probably not be appropriate for me to mention individuals as having played a particular part in a country's affairs, but this, Sir, *is no ordinary man. In Mr. Nyerere this country has a leader to whom not only the people of Tanganyika but many other in all parts of the world*

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1 According to Chidzero, the International Trusteeship System was a "new institution ... a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it." Chidzero, 1961:34-5. Rwelamira says that for Britain Her legal relationship with Tanganyika was only theoretical. See Rwelamira, 1981:206.

2 Ghai, 1981:146. According to Pratt, 1976:56-57, TANU was so popular as to be capable of embarrassing the colonial government, if not to push their demands through mass agitation.

3 Mwaikusa, 1993:681. See also Killingway, 1974:12.

4 Pratt, 1976:58-59 says that British officers had hope in Nyerere's moderation and anti-racism policies which meant that their role would continue after independence.

> *can look to win confidence to guide this emerging nation successfully through the very great tasks ahead.* I have already referred to the spirit of harmony which prevails in Tanganyika"[1]

These were more than mere personal opinion of a leader or customary empty compliments. This official opinion of Nyerere played a great part in sparing him of the bother of a Bill of Rights.

Actually following the colossal success of TANU in the general elections successively held in 1958 and 1959,[2] its popularity was unquestionable. But it may be implied from the speeches during the Conference that Macleod and Nyerere had become great pals. Some important issues including that of the Bill of Rights might have been ironed out before they reached official circles in the several private meetings they held in the Secretary of State's London flat.[3] And if that was so, nothing would have prevented Nyerere to impress upon Macleod that following the refusal of the British Colonial government to adhere to the limited human rights inherent in the Trusteeship Agreement, it would have seemed hypocritical for them to entrench guaranteed rights on the eve of decolonisation.[4] Indeed as recent as January 1991, Nyerere used the same argument when he, "charged that the Western powers are the least qualified to teach us democracy, their proven competence being in denying democratic rights, which they were doing just recently as the colonial masters in Africa".[5]

It is therefore important to emphasise the fact that the controversy on the Bill of Rights in Tanzania, was a post-independence internal dispute within the factions of TANU. The same started with the debates leading to the replacement of the Independence

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1 CO, 1961:11.

2 Held by virtue of the Legislative Council (Elections) Order in Council of 1957 (Cap.388), whereby TANU won all the seats reserved for Africans. See Listowel, 1949: 380-90.

3 Listowel, 1949: 383. The close relationship between Macleod and Nyerere has been confirmed by Mzee Rashid M. Kawawa in a recent interview. He also says that because of Nyerere's peculiar intellectual endowment and great vision , TANU had full confidence in him that they left upon him to settle with the British some things which might have included discussion on the Bill of Rights.

4 Read, 1995:129.

5 Mwaikusa, 1993:681, referring to DN, 1991.

Constitution by the Republican Constitution within the first year of independence, to which we now turn our attention.

8.2 Human Rights and Post-Independence Institutions of Governance

The Internal-Self Government was short-lived. Only seven months after its coming into operation, on 9 December 1961 the Tanganyika Independence Act, 1961[1] came into force. The latter legally established Tanganyika as an independent sovereign state, with a "fully responsible status within the Commonwealth".[2] Thus Britain ceased to have any responsibility for the government of Tanganyika, and no law of the British Parliament would henceforth be made to apply thereto (s.1).

Contemporaneous with the above, was the coming into effect of the Tanganyika (Constitution) Order in Council, 1961.[3] Dated 27 November 1961, this law effectively revoked all Orders in Council hitherto in application within the Territory (s.2 and First Schedule). These included the Tanganyika Order in Council 1920.[4] In its place section 3 of the 1961 Order provided for the Constitution of Tanganyika as had been set out in its Second Schedule.

Moreover the Order provided for the continuance of the operation of the existing laws. The same were defined as "all ordinances, laws, rules, regulations, orders and other provisions having the effect of law made or having effect as if they have been made in pursuance of the existing Orders and have effect as part of the law of Tanganyika or any part thereof before the commencement" of the Order (s.4). The above definition meant in effect the validation of the colonial legal order including, all acts of the executive made in pursuance of the repealed Orders in Council.

The fact that the same were subsequently to apply and be construed "with such modification, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order (s.4(1))"; did not make this legacy less onerous as far as the

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1 10 Eliz. c.2.
2 See the Title of ibid.
3 1961 No.2274.
4 Others were the Tanganyika (Legislative Council) Orders in Council (1926-1958) and the Tanganyika Order in Council, 1959.

building of a new democratic culture was concerned. Most of these laws are still in force and subject of controversy in current political debate.[1] Particularly relevant to this discussion , was the intended cessation by the Order of the effect as part of the law of Tanganyika, with effect from 9 June 1963, of the Emergency Powers Orders in Council, 1939-1961 (s.7). Surprisingly and contrary to the above provisions the said powers were to be continued,[2] and were only replaced in 1986.[3] Otherwise other provisions of the Order related to transitional measures in respect of the civil service, the National Assembly and the High Court.

At any rate the independence constitutional arrangement did not seem to satisfy the long-term political desires of the newly installed nationalist leaders.[4] The Tanganyika Independence Constitution had in a nutshell "introduced parliamentary democracy into Tanzania". By making the National Assembly, "the central institution of government, control over important aspects of state administration had been denied to the executive branch of government".[5] According to Martin, the Constitution failed to "take into account the two essential facts of Tanzanian politics", that is, "the need for strong executive government if the country's social and economic problems are to be dealt with, and the supremacy and ubiquity of the party".[6] Thus the author sees the Republican Constitution[7] as having come to solve the first problem above, whereas the Interim Constitution of 1965[8] dealt with the second.

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1 See among the 40 laws condemned by the Nyalali Commission. See NCR. 1991a.

2 By virtue of the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962, Cap.500 of the Revised Laws of Tanzania.

3 See s.28 of the Emergency Powers Act, 1986, Act No.1 of 1986.

4 It was the National Executive Committee (NEC) of TANU, in its meeting of January 1962, only about a month after independence day, which recommended that the Tanganyika Government turn into a Republic as soon as possible. See Mwakyembe, 1985:25, and McAuslan, 1964:502, who says that after independence, there was considerable dissatisfaction with the Independence Constitution, within the top ranks in TANU.

5 Martin, 1974:37. Also Mwakyembe, 1985:26 stating that "The Independence Constitution in short created a situation which could not allow the government to fool around", and giving as example the fearless and protracted debates on the Citizenship Bill and the issue of Africanisation; also Hansard, 1962:42; Leys, 1972:191-192; and Shivji, 1976:66-70.

6 Martin, 1974:37.

7 Constituent Assembly Act No.1 of 1962, Cap.499 of the Revised Laws of Tanzania. According to Nassoro, apart from severing the links with the British Crown the Republican Constitution was the first step towards the creation of "the kind of framework within which the regime in power would realize itself." Nassoro, 1995:5.

8 Act No.43 of 1965.

It is in the context of the endeavours of the new rulers to justify the proposed centralisation of power into the executive arm of the state at the expense of individual rights, that for the first time the Bill of Rights was mentioned.[1] It is necessary to appreciate this timing of events. In order to support the measures comprised in the Republican Constitution, it was imperative that a new rhetoric be coined, as is illustrated in the next few paragraphs.

The government submitted to the National Assembly for deliberation, the White Paper containing the Proposals for a Republic during the house's Second Meeting of the First Session between 5 June and 3 July 1962. The said proposals, in the manner that they introduced an omnipotent executive President, who also was intended to enjoy overriding powers over the National Assembly, prompted some concern from some Members of the TANU-dominated House. But Nyerere speaking from the back-benches,[2] and using his popularity[3] silenced any challenge against the Proposals. He stated *inter alia* as follows:

> "Our people would not understand what is this idea of governor-general, the Head of State, to whom we give this *heshima*, but has no power! Our people do not understand, they are not used to it. It never was traditional in their way of life, and it never was a thing in the colonial system. The colonial system was actually based on our own former system, which power was identified with an individual. There was the Chief somewhere, and the D.C., and the P.C. and Governor. This was clear and understood. Now, suddenly, Sir, on 9th December we confront our people with something they cannot understand ... let us form something that makes sense, and an Executive President makes sense in our circumstances (Applause)."[4]

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1 Martin, 1974:38.

2 He had resigned from the Premiership allegedly to re-organize the TANU from the grassroots, which in fact turned out to prepare an environment for the introduction of the single-party system. The challenges he had faced during the Parliamentary debates on the Citizenship Bill and the policy of Africanisation forced him to take the tactical move. This has been confirmed by Mzee Kawawa in a recent interview. Pratt, 1976:126, notes that he had to leave to enable Kawawa and his Cabinet to pursue sensitive changes, including consolidation of "the authority of the ruling oligarchy and limit the ability of opponents to challenge that authority". Also see McAuslan and Ghai, 1968:486.

3 In the words of Rashid M. Kawawa, the Prime Minister who succeeded him, Nyerere was the father of the nation to whom the people of Tanganyika were "entitled to express their gratitude", as they had found "this two-way traffic", in the sense that, Nyerere had "confidence in the people", and on their part, the people had "confidence in him". See Prime Minister's Closing Speech on the Motion "Proposals for a Republic", in Hansard, 1962:1116.

4 Ibid: 1106. Added emphasis.

The above seems to be a misstatement of history. It is difficult to understand how it was relevant to the African way of life, the pyramidal colonial system of governance.[1] It should have been clear to the speaker that District Commissioners and Provincial Commissioners were institutions imposed on the people for colonial purposes. That in Britain there were no similar authorities of central government at grassroots level, governance being in the hands of responsible local authorities. Thus there was no basis for comparing the institutions of coercion with pre-colonial systems of collective leadership. It implied to saying that the people of Tanganyika were used to non-democratic institutions of governance, that having been their way of life even before colonisation. Therefore the post-independence system should follow suit.

Furthermore Nyerere spoke against the fears expressed as to the likelihood of a too powerful executive President turning into a tyrant. He emphasised that constitutions in themselves were not safeguards against tyranny. To him real safeguard was in "the ethic of the nation ... If the people do not have that kind of ethic, it does not matter what kind of constitution they frame. They can always be victims of tyranny".[2]

In Nyerere's paradigm, as governments were necessarily coercive, for democracy to prevail, it was imperative that there be some "mutual confidence between leaders and the people". According to him, a tyrant "is usually a person who is frightened of the people", and was "incompatible with popular leadership". And that a tyrant "uses power, because he can no longer rely upon the faith of the people"[3]

Certainly there are several problems in Nyerere's view on governance stated above. His thesis did overlook fundamental social developments in colonised societies. First was the answer to the issue whether there could still be said to be in existence a truly African national ethic after all those years of colonial slavery and predominance of anti and

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1 Cole and Dennison, 1964:6.
2 Hansard, 1962:104
3 Ibid:1106.

undemocratic culture. Secondly it remained unanswered the issue whether institutions of governance developed out of the womb of colonial domination, could be subdued by the already trampled popular ethos of social control (ethic of the nation *a la* Nyerere).

The so called "mutual confidence" between leaders and the people, remained idealistic without the active promotion of the institutions of popular accountability at grassroots level. These were not visible in the Proposals for a Republic, where the omnipotent President was made to stand above and beyond the reach of any other institution. Moreover Nyerere's advocacy of people's power through the ballot box, did not provide solutions for the removal of an initially popular leader who turned into a tyrant and refused to quit. The latter included single-party regimes which manipulated in their favour the conduct of periodic elections.

However one must understand the challenges faced by Nyerere and his nationalist colleagues in the wake of independence. They had to resolve the paradox of continuity and change which faced them, one way or the other.[1]

In order to bring about the long desired development to the impoverished lot of the people while maintaining peace and stability, it was necessary that the new regime holds grip of the institutions of control. These have been listed in the case of Tanzania to include: the system of elections to the National Assembly, the National Assembly itself, the Permanent Commission of Enquiry and the Courts.[2]

This was done by maintaining only the traditional law-making role of the National Assembly, while transferring its supremacy to the bureaucracy through the executive presidency and the party. The end justified the means. That it was necessary and legitimate to server links with the British Crown was sufficient justification for whatever undemocratic institutions that were thereby established. And as for the popular legitimacy of their scheme

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1 See Chapter One.

2 McAuslan and Ghai, 1968:486. Also Pratt, 1976:126 who says that the pragmatic steps which were undertaken by the post independence government under Kawawa in 1961-62 were "first steps towards authoritarian rule by a political elite."

this was provided for by TANU's hundred per cent record in elections which led to independence and Nyerere's charisma.

Apart from that Nyerere is said to have developed the argument for the ideal democratic society by 1960.[1] This involved the "small, closely integrated, self-governing community" whereby sovereignty would lie in "an assembly of all citizens, and deep division would not develop to distract men from pursuing the good of all". Thus according to him the essence of democracy was to be:

> "government by discussion amongst men and women who share a common life and who are agreed upon their common goals and their basic values. In such a society, men will be able, through discussions and without bitterness, to reach nearly unanimous decisions about governmental policies."[2]

It is the above conceptualisation of democracy which led him to get committed to single-party rule because certainly, such democracy demanded for what has been called "a harmony of interests in a larger society".[3] While appreciating Nyerere's genuine efforts to inspire the development of the democratic ideal relevant to the poverty-stricken Tanganyika he had just inherited from the British colonial government, it suffices to say that the society he had in mind was idealistic after all those years of colonial domination and introduction of the country to commodity production.

He failed to take it as a fact that the Tanganyika he was now leading was class-ridden and the national harmony in his imagination would not be attained in the neo-colonial circumstances. And when the articulation of state control through the ruling party reached its zenith in the mid 1970's, there had been established in Tanzania a State-party which is discussed in the following section.

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1 Pratt, 1976:70.
2 Ibid.
3 Ibid.

8.3 The Rise and Fall of the State-Party

The Proposals for a Republic were just a tip of the iceberg of the real scope of the changes in the institutions of governance at all levels. The establishment of the unaccountable and omnipotent presidency to head a government which would no longer be responsible to Parliament,[1] only dealt with the relationship of the organs of state at the highest levels. Nothing was intimated during the debates of the above-mentioned White Paper, as to similar changes at the grassroots levels. This omission denied the Parliamentarians an opportunity of appreciating the real impact of and nexus between the executive presidency they were legislating upon and the instalment of authoritarian institutions of governance at District and Regional levels. It did not take long before the former colonial presence of central government through the District Commissioner[2] was reconfirmed by the statutory creation of similarly autocratic institutions.[3] Briefly stated, there followed a series of legislative initiatives basically establishing a political stage from which would be launched the campaign for the establishment of the single-party system.

Thus the President inherited most powers which the colonial governor had enjoyed. Above that the Preventive Detention Act 1962[4], enabled him to detain any person in the Republic for security reasons. His action thereunder was not to be questioned by any court of law. It did not even take long for the real impetus of this law to unveil. One Mr. Kasanga Tumbo a former trade unionist turned Member of Parliament for Mpanda Constituency, vigorously opposed the passing of this law by the National Assembly. He subsequently resigned from TANU and government in protest after its passage to form a new political

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1 Section 43(2) of the Independence Constitution providing for the collective responsibility of the Cabinet to Parliament, was not included in the Republican Constitution, 1962.

2 See supra, chapter Seven.

3 By the Area Commissioners Act, 1962 and the Regions and Regional Commissioners Act, 1962; caps 466 and 401 of RLT, 1965 respectively. Now repealed and replaced by the Regional Administration Act, 1997.

4 Cap.490 of RLT, 1965.

party the Peoples Democratic Party. He soon became the earliest victim of the piece of legislation.[1]

It should be emphasised the post-independence regime's effective employment of the limitless powers so availed to it, to "impatiently" harass any other forms of socio-political institutions including political parties, and other popular organisations.[2] Thus even some traditional chiefs, having gained sufficiently threatening political legitimacy because of colonial co-option by the indirect rule policy, became unbearable. Therefore the office of traditional chief was arbitrarily abolished,[3] outlawing any possible claims in that regard in courts of law.[4] Indeed the repudiation of the people's closest institution of governance by consent, was a measure which even the colonial regime never attempted to do in such an indiscriminate manner.

Actually it was the traditional institutions' potential for being autonomous and proximate to popular immediate interests which was problematic to the centralised governance desired by the post-independence regime. Thus for the same reasons the generally popular trade union movement also could not be tolerated. Trade union leaders throughout the country rallied to question the endeavours to neutralise them in the wake of their objection to TANU's lack of sufficient emphasis on immediate Africanisation,[5] and the post-1962 changes discussed above. By 1964 two hundred of them had been detained without trial.[6] In their absence a state-controlled union was established through the National Union of Tanganyika Workers (Establishment) Act, 1964[7].

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1 Mwaikusa, 1993:686. Pratt, 1976:123.

2 Ibid:687, Maguire, 1969:338-360.

3 African Chiefs Ordinance (Repeal) Act 1963, Cap.517 of RLT.

4 Aimed at Chief Thomas Marealle of Marangu, the Chiefs (Abolition of Office: Consequential Provisions) Act, 1963 was passed to deny him of the opportunity to enforce a court decree in his favour for the damages suffered as a result of the abolition of his traditional office. See *Marealle v. Kilimanjaro District Council*, High Court of Tanganyika at Arusha. Civil Case No.44 of 1961 (unreported).

5 Friedland, 1967:93.

6 Ibid. Also Pratt, 1976:189.

7 After the merger between TANU(Tanzania Mainland) and Afro-shirazi Party, (Zanzibar) to form CCM on 5 February, 1967, a new Union under the party structure replaced NUTA. See *Jumuiya ya Wafanyakazi wa Tanzania* Act 1979, Act No.24 of 1979.

This law dissolved the Tanganyika Federation of Labour (TFL), and outlawed trade union activities apart from those done under the newly established organisation. One can also see the same trends in the way the post-independence government has dealt with local government, youth and women organisations. The relevant associations and their leadership were co-opted and centralised turning them into what one writer has called "political guinea pigs"[1]

It was thus with the above accomplishments in stock that was appointed the Presidential Commission on the Establishment of the One-Party State in Tanzania. Among its terms of reference, was included the question whether a Bill of Rights should be included in the desired one-party constitution. Again this was TANU's attempt to legitimate the system of governance earlier established by the Republican Constitution. The contents of the recommendations of this Commission rejected the Bill of Rights proposing instead the inclusion of broad human rights principles in the Preamble of the intended constitution.[2] This has already been subject of wide academic discussion since the debate was initiated by Robert Martin in 1974.[3]

However one thing that has not been clearly mentioned by Martin and others, is the fact of the similarity between the Commission's recommendations and the Presidential terms of reference in this regard.[4] There is reason to believe that, the Commission could have felt dictated by Nyerere's terms of reference. The Commission was incidentally chaired by Rashid M. Kawawa, one of his closest lieutenants. Indeed there is no evidence to the effect

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1 Mwaikusa, 1994.

2 Statements in the Preamble were declared by the High Court as ineffective to base a legal claim in the case of *Hatimali Adamji v. EAPT Corporation,* 1973 LRT No.6, although in another case of *Thabit Ngaka v. Regional Fisheries Officer* (1968) EA 406, the plaintiff's claims for unpaid wages succeeded on the basis of human rights declarations in the TANU Constitution appearing as a schedule to the Interim Constitution of 1963.

3 Martin, 1974. See also among others, Mwaikusa, 1991, Peter, 1991 and LAC, 1985:11-85.

4 See RPCOPS, 1965.

that a large part of the citizenship consulted understood what a Bill of Rights meant to them.[1] Yet it is on record that the voluntary advice which did contradict the spirit and letter of the President's terms was ignored.[2]

No wonder that the main theme of the reasons behind the rejection of the Bill of Rights was Nyerere's earlier claim of the ability of the people on the basis of the "ethic of the nation" to prevent tyranny and other excesses by the organs of state. Otherwise the basic thinking behind the whole scheme was essentially the developmentalist approach.[3] In the same vein fears were expressed as to the lack of sympathy of the largely expatriate Judiciary, and thus avoidance of unnecessary conflicts for the good of development was preferred.[4]

Some mention should be made here of the Permanent Commission of Enquiry (PCE), an ombudsman institution established by statute [5] in 1966 under the sponsorship of TANU.[6] It was to operate as a checking mechanism against abuse of power by the state in the absence of automatic checks from the largely uneducated people of Tanzania. The introduction of the PCE was admission by Nyerere that his `ethic of the nation' thesis was flawed.

In any case the PCE itself was a non-starter, of all things for lacking independence, the most basic requirement of any effective Ombudsman. The Commission was not meant to wield any power or authority of its own. It would only make recommendations to the President (s.9) under whose office actually it was part, and who was beyond their investigation jurisdiction. (s.14) Moreover nothing was spelt out as to how the Commission would make sure that the Chief Executive acted on their recommendations. (s.15(1)). Worse

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1 Kawawa in a recent interview denies any dictation from Nyerere. He claims that the Commission received views from TANU branches nationwide and other interested persons.

2 See LAC,1985:14, mentioning the Tanganyika Law Society.

3 See supra, Chapter One.

4 For the details see Martin, 1974 and Mwaikusa, 1991.

5 The Permanent Commission of Enquiry Act, 1966, Act No.25 of 1966, as was amended by Act No.2/68 and Act No.13/80. See also articles 129,130 and 131 of the Constitution of the United Republic of Tanzania.

6 See the defense of the Commission in Nyerere, 1988:39-40.

still the President could decide to discontinue the Commission's investigations, and also deny it access to certain evidence. (s14(1)) Briefly stated the PCE was and is still not the best mechanism for vindicating human rights breaches, even on logic alone. The institution's activities were too close and subject to the discretion of the President to be able to question any act of the state which involved the latter even indirectly.[1]

After all in spite of the rigorous mass-education campaigns waged to its credit,[2] the PCE's mandate remains largely unknown if not appreciated. In the field research conducted in Tanzania in 1993,[3] only 100 out of our 300 respondents that is 33.3 per cent, said they knew what the PCE stood for. More interesting was the fact that only 42, that is 14 per cent of the same sample thought the PCE was adequately protecting the people against the excesses of the agents of state.

The PCE has in the past been positively assessed as a viable institution of control of the bureaucracy in post-independence Tanzania.[4] It is insisted that the PCE is not purely advisory because although the President is free to take any action he wants, he "is required to state what action, if any, has been taken by a person, department, or organisation to correct or ameliorate any conduct, procedure, act or omission that is adversely commented upon in the report".[5]

However it has been conceded that for being a presidential instrument the PCE was bound to fall victim of elitical manipulation, and therefore fail to "stand up to the

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1 For a contrary view, which considers the overall performance of the PCE as a success on account of the number of cases dealt with as reported, and not at a result of the actual record of the defence of human rights on the basis of particular action taken, see Seaton and Warioba, 1983:68.

2 Ibid. See a critical analysis on the Commission in Mjemmas,1993, Frank, 1972 and DANIDA, 1994.

3 See supra, Preface, on research methodology.

4 McAuslan and Ghai, 1968:502-507; and Msekwa, 1978:31.

5 McAuslan and Ghai, Ibid:503. However it should be noted that the President is not compelled to supply to the complainant the necessary feedback of the action taken, thus denying the latter of knowing whether or not he has been vindicated.

Government and the party in the way that a court of law, enforcing a Bill of Rights, could."[1]

Therefore one cannot say that the PCE has in the past provided an effective alternative to the Bill of Rights system. The situation was indeed fertile ground for the growth of what has come to be known as the state-party in Tanzania to which we now turn our attention.

It is important to note that the establishment of the one-party state in Tanzania by the Interim Constitution of 1965, did not only mean at the socio-political scenario, the control by the party of the organs of state. It also generated what Robert Martin has called the *ubiquity* of the party into all spheres of public life in the country.[2] The same represented what Issa Shivji has described as, "a high fusion of power, whose defining characteristic was the suppression of civil society on the one hand, and the concentration of power in the executive, marginalising the Legislature and the Judiciary, on the other".[3] Thus Shivji sees the state-party as one of the main pillars of what he refers to as the extra-legal state, the other being the concentration of powers in the imperial presidency *a la* Okoth-Ogendo.[4]

Shivji's main characteristics of the extra-legal state which is essentially authoritarian can be summarised as follows.[5] First is the lack of openness in the process of the exercise of discretion, making it the rule the overshadowing of administrative fiat and decision-making over "judicial resolution of disputes"(p.81). Then one finds an increase of what he calls enabling laws, allowing practice of wide and arbitrary discretion (p.82). Furthermore and significant of the extra-legal state, is what Shivji calls the "pervasive and arbitrary use of state coercion without ideological meditation". (p.82) In actual sense there develops gross disrespect of the law and legal institutions in general, demoting the latter in terms of the

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1 Ibid: 504.
2 Martin, 1974:37.
3 Shivji, 1994:84.
4 Okoth-Ogendo, 1991:13-15; supra, Chapter One.
5 Supra: 81-83.

budgetary attention given and the size of emoluments and other staff privileges. Thus in Shivji's words:

> "..the state rules *through* law but not *within it*. There is no lack of legal rules as such. But legal rules operate more or less directly as transmission belts to transmit state force. Thus state force is not disguised in ideology of rights or the rule of law ideology".[1]

The above is the exact analysis and description of the state of affairs of the Tanzanian state-party which was in full swing from 1962 after the promulgation of the Republican Constitution to the adoption of the Constitution of the United Republic of Tanzania in 1977.

In particular the direct influence of the executive arm of state in the law-making process was a typical example. At the height of the state-party, by virtue of articles 81-87 of the Constitution as they then stood, the structure of the National Assembly was as shown in Table 8.1.

TABLE 8.1: The Composition of the National Assembly at the Height of the State-Party in Tanzania in the late 1970s

Type of Member	Number	Percentage of Total
A. Members directly elected from Constituencies	111	46.4
B. Members indirectly elected by the National Assembly and House of Representatives in Zanzibar	72	30.1
C. Direct Appointees of the President	56	23.4
D. TOTAL	239	100

SOURCE: Adapted with minor modifications from Shivji's Table in Note 6 of Shivji, 1978:27.

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1 Ibid: 83. Also Shivji, 1990.

One thing is clear in Table 8.1 above, that there were less than 50 per cent in the National Assembly of Members who were directly elected and therefore representatives of the people at grassroots level. The two other groups entered Parliament through the legitimised back-door, and invariably they comprised well-known party stalwarts, then known in the *Kiswahili* political jargon as "*mwenzetu*" (one of us). More important was the fact that most of such people, were the same personnel who occupied positions in the even lesser representative organs albeit most powerful of the state-party, namely, the Cabinet, Central Committee and the National Executive Committee (NEC) of the ruling party.

It was through the above organs that the imperial presidency institution illustrated itself. All the three bodies were headed by the same person, the President cum Chairman who actually through the party machinery and the coercive organs of state controlled the country's public life, including the law-making process.[1]

Undoubtedly this was the scenario which allowed a freehand to the government to pursue and give effect to unpopular projects, without any or with minimal consultation but at the expense of the rights of the people. The forced mass-villagisation programmes of the early 1970s and the transfer of the country's capital from Dar es Salaam to Dodoma apart from the constitutional changes mentioned above, were among some of such unpopular public ventures.

8.3.1 The Government's Human Rights Record Prior to 1984

Tanzania is invariably classified as not so oppressive country with minimal human rights abuses.[2] Such assessment seems contradictory of the way the legal and political regime operated at the height of the state-party as has been shown above. But it doesn't

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1 Ibid:83 explaining how the President was at the chair of all organs concerned with the formation of policy in the NEC, the discussion and translation into law of the same in the Cabinet and through the Prime Minister and the whole Cabinet, making of the law in the National Assembly, before the passed Bill came to him for assent for it to become law.

2 See McAuslan, 1996: 170.

follow always, that there is no democracy and respect for human rights in all countries with single-party regimes.[1]

In September, 1976, a seminar organised by the International Commission of Jurists on "Human Rights In a One-Party state", was held in Dar es Salaam Tanzania.[2] It drew participants from 29 countries in all regions of the world. Generally this seminar unanimously agreed that although the single-party system posed dangers to human rights observance, the system was consistent with their preservation. Therefore "the protection of fundamental human rights and basic freedoms under the rule of law, should be among the primary objectives of the one-party state, as much as of a multi-party state."[3]

However the seminar set out a number of factors which were necessary to guarantee human rights observance in a single-party state, namely: high degree of openness, free discussion and public participation; commitment of the party and its leaders to human rights and the rule of law; making sure that the party does not become narrow, partisan and elitist; the unequivocal guarantee of the independence of the Judiciary; making sure that the supremacy of the party is exercised in accordance and under the law; the entrenchment of a justiciable Bill of Rights; expansion of the legal profession beyond private practice; imposition of effective safeguards on preventive detention; promotion of non-legal protection of human rights through ombudsman-type institutions; and many other pre-requisites.[4]

Most of these requirements have over time been observed or constitutionally provided for by the government. But there is one thing which the ICJ seminar contributed to the human rights discourse in Africa which has not been sufficiently underscored; that is the need of having a ruling political party and its leadership being really committed to human rights observance.

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1 See Conclusions in ICJ, 1978.
2 ICJ, 1978.
3 Ibid, Conclusion 1 on p.109.
4 See Ibid.

This is what was lacking in the Tanzania of the single-party era between 1965 and 1992, and which is still the case to a certain degree,[1] even after the establishment of the multi-party system. It is not good enough to have legal provisions on democracy and human rights without committed practice thereof by the state.

That the Tanzanian human rights situation is not the worst in Africa is due to a variable of factors including the historical harmonious peoples' relations in the country,[2] a common language, multiplicity of tribal communities and certainly the charismatic leadership of the First President Julius Nyerere, who intentionally took advantage of the above factors.

Indeed to a significant extent there were a number of anti-human rights misdeeds which the government either sponsored or condoned during the period in question which do not distinguish it from any other oppressive regimes in Africa.[3]

This is the kind of governance Nyerere and his party built for themselves, but of which authoritarian characteristics worried even himself, one reason why he accepted to postpone his retirement in 1980.[4] Indeed it was during his last term in office that he set in motion the Constitutional Debates of 1981 which led to the 1984 constitutional amendments including the entrenchment of the Bill of Rights. But by then the state-party had already reached its crisis, which we move on to discuss in the next section.

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1 See discussion in Part Three on this point.

2 Ref. Chapter Six.

3 See Shivji, 1990, who has made a list of some *causes celebres* in that regard, categorizing them into, legal but illegitimate coercion, illegitimate coercion, illegal coercion and extra-legal coercion, whose details we cannot discuss here for economy of space.

4 Warioba interview.

8.4 The Prelude to the Bill of Rights

Several reasons have invariably been given in an attempt to explain why the government made an about turn decision to concede to the demands of the Bill of Rights in 1984. These include, pressures of Zanzibaris within the party in support of the Bill of Rights in their bid to rewrite the Islands' bleak human rights history; the failure of the Tanzania Mainland's conservatives to stop the Zanzibari campaign in view of winning bargains in a more complex and sensitive Union issue; indirect pressure from the International human rights regime, and Nyerere's contribution in the wake of his imminent departure from active leadership, himself having no confidence in the ability of his successors to manage the authoritarian state he was about to bequeath upon them, without moving to tyranny.[1] It is not intended here to dwell in detail on the above aspects, the area having been over-researched.

However it suffices to emphasise that although the Bill of Rights resulted from a combination of factors, the effects of the economic crisis of the late 1970s did indeed significantly contribute thereto. These on their part engendered unintended responses by the state to both internal and external pressures in that regard. It should be pointed out that the intensification of the state-party discussed above in this chapter, had a backlash effect of alienating the ruling oligarchy from the masses suffering in poverty. The overall consequence was the gradual loss of people's support which ironically had been the *raison d'etre* of the party's strength and monopoly it enjoyed. This was to prove costly to them during the economic crisis.

It must be remembered that ever since independence TANU had been a party which drew its popularity on account of its mass-oriented and non-sectarian policies. Thus it has been argued that even at the height of the state-party, the ruling regime's authoritarian orientation and practice was generally tolerated by the people. This was because of their

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[1] See Mwaikusa, 1991:690-692; Peter, 1990:5-6, Shivji, 1991. As to Nyerere's fears see his statement in an interview that as President he had powers of a dictator. See Hopkins, 1971:26.

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belief in the party's backbone policy of *Ujamaa* Socialism declared since 1967, the same having promised the ultimate betterment of their lot.[1]

Indeed all post-1967 economic policies were "distinguished by a strong commitment to egalitarianism and the reduction of poverty, ignorance and disease".[2] This human-oriented attitude has invariably attracted sympathy from external critics of the regime.[3] But a series of unforeseen economic events happening in succession during the period 1977-1980, completely crippled the government in terms failing to provide the little it had been doing in social services including free education and medical care. These included the Uganda war, the collapse of the East African Community, the second oil prices shock and the gradual fall in the share of exports in the GDP unmatched by a concurrent decline in imports.[4] This translated in terms of constitutionalism, the crisis and therefore the fall of the state-party was in progress.

The government attempted to salvage the political situation by transferring the blame for economic hardships to economic saboteurs.[5] This was done in a typically oppressive manner, by secretly arresting *en* mass suspected individuals throughout the country and throwing them in detention without any iota of legal authority. The latter was to be done retrospectively by the Economic Sabotage (Special Provisions) Act 1983[6] and the Economic Sabotage (Special Provisions) Act 1983[7]. The first law excluded the ordinary courts' jurisdiction to entertain any matter arising from its enforcement creating a special tribunal to that effect, and reserved the power to grant bail only to the President.

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1 Shivji, 1994a:83, 1992 and 1995. Also supra, Chapter One.
2 Wagao, 1993:48.
3 See for example Green, 1995.
4 Ibid. For the economic trends leading to the crisis see Malyamkono, 1990:139-140, Appendix 1
5 For a detailed account of the events leading to the 1983 crackdown on economic saboteurs, see "Prelude" in Malyamkono, 1990:x-xix.
6 Act No.9 of 1983.
7 Act No.10 of 1983.

Only two months thereafter, it had to be amended to remove any right to bail under the purview of the Act, and hence for the second statute mentioned above. This was done to remove the anomaly of the impossibility of the President to deal with all bail applications, following the incarceration of thousands of suspects, an operation unknown even under colonial emergency laws. But subsequently, the operation having been conducted in a rat-trap fashion catching large numbers of the unintended victims, forced the re-introduction of bail in the law and the creation of a special division in that regard within the High Court.[1]

In any case the anti-economic sabotage campaigns never lived to the intended political gains. Instead it sank the party and government to further unpopularity, and to the people's surprise the whole project did not involve the real culprits well known to them. At the constitutional level, the fateful campaign strengthened calls for the dismantling of the state bureaucracy, in the then on-going constitutional debates. Also that although the Bill of Rights had not been included within the terms of reference of the above debate, there was expressed mass-demand for the same. Both of these were granted by the 1984 constitutional amendments, marking the beginning of the road towards what Shivji refers to as the intra-legal state.[2]

But although there was full support of the Bill of Rights in the National Assembly which subsequently passed the amendments,[3] it was obvious that the government had only grudgingly conceded.[4] The over-reliance on foreign aid by the country to solve the economic crisis, had forced the leadership to submit themselves to the international financial

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1 By the Economic and Organized Crime Control Act, 1984. According to J.S. Warioba who was then the Attorney General, this law followed pressures from his office, which having been excluded from the making of the original law, was consistently against the measures. That a ripe opportunity for change presented itself when Nyerere attempted to free against the law two catholic priests (Nyerere is a catholic), and one Barongo, a long time friend and political ally.

2 Shivji, 1994:88.

3 The Bill for the Fourth Constitutional Amendment Act, 1984, (erroneously printed after becoming law as the Fifth), was passed by a 100 per cent majority of the Members present (only one was absent) in the National Assembly i.e. 124 from Tanzania Mainland and 62 from Zanzibar. See Hansard, 1984:512.

4 Postponing the justiciability thereof for three years. See s.5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act , 1984, Act No.16 of 1984.

institutions, having previously rejected to do so for over a decade. This necessarily meant putting the house in order in the wake of the Carter doctrine tying aid to good human rights record. This coupled with the country's international obligations both at the African and international planes as was discussed in Chapters Four and Five, there was no other room for escape. The half-hearted acceptance by the government of the Bill of Rights expressed itself in the letter of the provisions themselves, and it still does so in practice, as we intend to illustrate in Part Three.

PART THREE

THE BILL OF RIGHTS IN THE CONTEXT OF STRUGGLES FOR WIDER DEMOCRACY AND CONCLUSION

CHAPTER NINE

Main Features Of The Tanzanian Bill Of Rights

9.0 Introduction.

Part of this thesis provides an overview of the practical operation of the Bill of Rights. As it is not possible to discuss all the rights provided, focus is directed to the study of political rights and freedoms of association and peaceful assembly. These are analysed in the context of the constitutional changes for wider democracy which took place between 1992 and 1994. This chapter examines the significant features of the Bill of Rights, pointing out any innovations enshrined therein. The main purpose is to expose its peculiar characteristics while assessing its effectiveness. Whereas the chapter particularly focuses on the question of whether the Bill of Rights conforms with or departs from the dominant human rights discourse, it will also attempt to draw attention to its weaknesses. It is shown how the courts and other actors have responded to both the enactment and enforcement of the Bill of Rights, particularly in making this fundamental document at all meaningful.

The approach here is different from the general trend in the Tanzanian literature on this subject. Most writers[1] have generally followed what can be called the `derogation approach'. This involves testing the effectiveness of the rights provided by examining the extent or potential capability of the same being derogated from by the organs of the state. There is failure to exercise a closer analysis of the provisions themselves. Shivji has attacked the above writers for lacking an in-depth theoretical analysis. [2] This chapter attempts a

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[1] See for example, Mwaikusa, 1991; Mwaikusa, 1990; Peter; 1990; Mbunda, 1988; Mbunda, 1994; Wambali, 1994; Bahroon, 1994; and Mwakyembe, 1985.
[2] Shivji, 1991.

better understanding of the rules as they stand, in the context of the socio-legal regime within which they operate.

The Bill of Rights forms Part III of Chapter One of the Constitution of the United Republic of Tanzania, referred to as the `Basic Rights and Duties`. This part covers a total of 21 articles, from article 12 to 32.[1] This is the source of the law for the protection of human rights.[2] However relevant decisions of courts in England and other Commonwealth countries, have begun to inspire and are reliable references in Tanzanian courts. Moreover, although it is denied that no particular model was used when drafting it,[3] it is generally similar to those of Kenya and India. In this sense in its content it is mainly liberal-democratic as the above are models of the European Convention of Human Rights.[4]

9.1 The Personal Liberties and Civil Rights Distinction.

There seems to be a distinction between some groups of rights which are referred directly as rights, and others which appear as rights of a particular freedom mentioned. The first category includes the right to equality, (arts. 12 & 13) right to life, (art. 14) right to personal freedom, (art. 15) right to privacy and personal security, (art. 16) right to participate in national affairs, (art. 21) right to work, (art. 22) right to fair remuneration (art. 23) and right to acquire and own property. (art. 24) On the other hand, we witness the second category with the right to freedom of expression, (art. 18) right to freedom of religion (art. 19) and the right to freedom of association. (art. 20)

Human rights can be classified in many ways, including the United Nations' distinction between economic, social and cultural rights on the one hand, and civil and

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[1] As were added to the Constitution of the United Republic of Tanzania by section 6 of Act 15 of 1984.

[2] Note that the Constitution of Zanzibar has its own Bill of Rights, thus providing Zanzibari Tanzanians with at least two alternative sources of the law of the protection of their rights under the Constitution.

[3] Hon. Warioba, Interview. As Attorney General he was directly involved with its drafting.

[4] Ghai, 1995.

political rights on the other. But the categorisation in the Bill of Rights, is related to the distinction between personal liberties which "speak to the security of life and the dignity of the individual", and civil rights which "pertain to her participation in the community and the political affairs of the state".[1] More interesting in the above classification are the legal consequences which may arise therefrom. This can be deduced from the wording of the provisions themselves. The Indian situation is more explicit than that of the Tanzanian Bill of Rights. In India a clear distinction is made between civil liberties in the rest of the Bill of Rights on the one hand, and fundamental freedoms provided in separate articles.[2] Whereas in the case of the former the rights are provided for without any inherent encroachments, the latter are subjected to limitations and conditions, on the basis of which such rights could be taken away or abrogated[3].

The same could be said of the Tanzanian Bill of Rights provisions, although it does not categorise the rights provided in the same lines as its Indian counterpart. The category of rights identified above as personal liberties in articles 12, 13, 14, 15 and 16, are not embedded with any limitations as to their application, save for the provisions of the Constitution itself.[4] In the case of the right to personal freedom, it is declared by section 15(1) to be "inviolable". It can therefore be argued that the use of that strong phrase, implies the intention of the consttution to debase the limitations that follow in the same article.

Yet on the other hand, the other rights we have called civil rights in articles 17, 18, 19, 20, 21 and 24, are couched in such a way as to be limited by any relevant law of the land.[5] Therefore apart from the general limitation clauses in articles 30 and 31, personal

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[1] Ghai, 1995, writing on similar provisions of the Kenyan Bill of Rights .

[2] The rights to freedom of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, and to practice any profession, or to carry on any occupation, trade or business; (art. 19) protection of rights and personal liberty; (art. 21) and protection against arrest and detention in certain cases. (art. 22)

[3] See *Ram Singh v. State of Delhi*, AIR 1951 SC 270 (para 5).

[4] In the case of article 13(2) forbidding anti-discriminatory laws.

[5] Articles 22 and 23 relating to the right to work and right to fair remuneration respectively, stand as an exception to the general rule.

liberties seem to be enjoying wider constitutional protection than that given to the above-named civil rights. The enforcement of the latter is impeded by extra hurdles within the relevant provisions themselves. But it depends on what courts will determine as reasonable limitation, which shall be the subject of discussion in this chapter.

9.2. The Place of Economic and Social Rights in the Bill of Rights.

One of the main features of the Bill of Rights is its omission of second generation rights. This is a weakness considering the fact that the Bill was entrenched after Tanzania had already acceded to the International Covenant on Economic, Social and Cultural Rights.[1] She had also actively participated in the promulgation of the African Charter on Human and Peoples Rights.[2]

It is only the right to freedom of work which is provided for. (arts. 22 & 23) Yet while article 22 (1) provides for every person's right to work, clause (2) thereof expressly restricts to citizens only the entitlement to "access on equal terms to every office and every function under the state". This makes it questionable whether the same conforms with the "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts", in article 6 (1) of the International Covenant on Economic and Cultural Rights. Again one notices the absence of the direct provision of the right to form and join trade unions, if not to strike, together with the right to a fair remuneration, as is the case in the Covenant. The above negation could well have been influenced by the African Charter whose article 15, merely provides for "the right to work under equal and satisfactory conditions ...[and] equal pay for equal work".

It suffices here to say that the ommission makes the enforcement of the right to fair remuneration unsecured. It is only through collective action that underpaid workers can win battles, against their employers, for higher wages. Leaving trade unionism entirely to

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[1] See Chapter Five, above
[2] Ibid.

ordinary legislation as Tanzania has done[1] gives the government, and employers, space to control, manipulate and otherwise despise trade unions with only minimal chances of successful judicial review.[2]

However one sees still room in the Bill of Rights capable of accommodating some economic rights as are comprised in the Covenant and the African Charter. Certainly it may be too onerous for countries with weak economies, to guarantee in their constitutions such economic and social rights as for example, the right to social security, including social insurance, and the right to everyone's adequate standard of living for himself and his family, which are contained in articles 9 and 11 of the Covenant respectively. But there cannot be justification for the failure to guarantee some special protection to the family, including the welfare of children, special attention to mothers before and after childbirth and the right of consent before marriage. The family, being "the natural and fundamental group unit of society",[3] is supposed to attract a substantial portion of national resources however minimal they may be.

The same applies to "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" as set out in article 12 of the Covenant. It is ironic that the same international community which sets the human rights standards has also been maintaining institutions whose policies undermine the attainment of some of those rights in poor countries like Tanzania which are the net recepients of economic aid. Through conditionality packages imposed by the World Bank and the IMF, poor countries are coerced into curtailing public expenditure on basic services like the provision of free medical care, denying millions the right to health. For the same reasons poor countries cannot live to the

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[1] See the Organisation of Tanzania Trade Unions Act, 1991, Act No. 20 of 1991, and the Trade Unions Ordinance, Cap. 381

[2] The same was true in 1993, when the Organisation of Tanzania Trade Unions called a strike of all government employees in the country in demand of higher wages, which was scornfully condemned by the Government threatening striking employees with dismissals. Yet the OTTU never even contemplated court action.

[3] Article 10 (2) of UNGA, 1966.

requirements of article 13 of the Covenant, providing for the right to education to be offered to everyone freely at primary level and made accessible to all for secondary and higher education.[1] It is thus clear that these rights which are really fundamental to the well-being of any society, should be guaranteed in the Constitution in order to put the government under constant attention as to their realisation to the best of economic ability.

The question remaining unanswered is whether the mere omission of the above-mentioned rights renders them completely impossible to enforce within the scope of the Bill of Rights. We do not think so, if one applies liberal interpretation of the Bill of Rights to include all rights and legal principles recognised by the Constitution as a whole. It should be noted that among the things towards which article 9 of the Constitution requires the state and all its agencies to direct all their policy and business, is "the maintenance and upholding of the dignity of man through full compliance with the provisions of the Universal Declaration of Human Rights".[2] Therefore as the Universal Declaration is in fact the original source of economic rights, the derogation thereof has to be questioned under the machinery provided anywhere in the Constitution, including that under the Bill of Rights. This is despite the fact that article 9 expressly excludes its own enforcement. It is not an overstretched interpretation to presume that the makers of the Bill of Rights in 1984 had in mind the requirements of article 9 mentioned above.

However Chief Justice Francis Nyalali in an academic presentation argued for a narrower perspective but with the same effect.[3] He referred the same as the Guiding Principles which he likened to the Directive Principles of State Policy found in Part IV of the Constitution of India, which are also non-justiciable.[4] While relying on some decision of the Supreme court of India,[5] he said:

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[1] In Tanzania since 1992, health services and primary education are no longer offered for free.
[2] Clause (f) of article 9 of the Constitution of the United Republic of Tanzania.
[3] Nyalali, 1991: 2.
[4] See article 37 of the Constitution of India.
(1973) 4 S.C.C. 255.

> "...the provisions of the Universal Declaration of Human Rights, ...which is one of the Fundamental Goals and Operative Principles of State Policy under our constitution, are a required guide and motivation for all activities of organs of state, including the courts. It can thus be said that although the failure by any person or state organ to observe any of the provisions of the Universal Declaration of Human Rights will not attract any legal censure or invalidation by the courts, I have no doubt the courts are required to *be guided by it in applying and interpreting the enforceable provisions of the Bill of Rights as well as the provisions of the Constitution and all other laws*".[1]

Therefore the Bill of Rights should always be interpreted and construed as embracing the principles of the Universal Declaration of Rights, including economic rights.

9.3. The Addressees and Beneficiaries of the Rights Provided.

Generally speaking one should expect rights to be available to any person. But in the Bill of Rights this is true only of those provisions which address themselves to "every person", such as in the case of equality before the law (art. 13), right to life (art. 14), right to personal freedom, (art. 15), right to freedom of expression (art. 18), right to freedom of religion (art. 19), right to freedom of association (art. 20), right to work (art. 22), right to fair remuneration (art. 23), and the right to acquire and to own property (art. 24). This too applies to those provisions which have used the phrase "all men" as in the case of the right to equality (art. 12)[2] and the right to personal freedom (art. 15); and the phrase "human person" as in the case of the right to privacy and personal security (art. 16).

It is not the case with the remaining provisions of the Bill of Rights which expressly address themselves to "every citizen"; these are: the freedom of movement (art. 17), the right to be informed of developments in the country and in the world (art. 18 (2)), the right to participate in national public affairs (art. 21), and the entitlement to access on equal terms to

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[1] Supra Added emphasis.

[2] According to the Interpretation of Laws and General Clauses Act 1972, Cap 1 of the Revised Laws of Tanzania, reference to 'man' in the laws of Tanzania includes woman.

every office and every function under the state (art. 22 (2)). The issue is whether the latter rights are indeed limited strictly to citizens as so recognised by the citizenship law.

Regarding freedom of movement, it may be understandable that the restriction was made in recognition of the conditions usually imposed on non-citizen immigrants, in respect of visa requirements or otherwise by the Immigration Act 1976.

These rights are restrictive in their application, and thus are different in kind from other rights which may be enjoyed and enforced by every human being, only subject to some jurisdictional limitations. Nevertheless the Bill of Rights provisions of such limited application are not peculiar to the Tanzanian document only. The same are, for example, also both conspicuous in the Indian Bill of Rights[1] and in the Constitution of Kenya.[2]

9.4. The General Derogation from the Rights Provided.

The Bill of Rights is subjected to derogation clauses in article 30 and 31 of the Constitution. The former provides for a general derogation, while the latter is concerned with special situations in the application of extraordinary powers of state. This is a significant feature of the Tanzanian Bill of Rights, both in form and substance. We first examine the extraordinary powers of the state in the following section.

9.4.1. Extraordinary Powers of State.

Extraordinary powers of state are provided for in article 31 (1) which states thus:

> "...an act of Parliament shall not be invalid for the reason only that it provides for the taking, during periods of emergency, or in ordinary times in relation to individuals who are believed to be conducting themselves in a manner that endangers or compromises national security, of measures that derogate from the provisions of sections 14 and 15 of this constitution".[3]

For example article 15 relating to the prohibition of discrimination, article 16 providing for equality of opportunity in matters of public employment and article 19 providing for a number of freedoms.

For example section 80 providing for protection of freedom of movement, and protection against non-discriminatory laws by virtue of sub-section 4 (a) of section 81.

Article 14 provides for the right to life, and article 15 for the right to personal freedom, both generally described as individual liberty.

Briefly stated the above provision removes the guarantees to the rights provided for in articles 14 and 15 of the Constitution during a state of emergency, by technically suspending those articles automatically upon a proclamation of a state of emergency.[1] It has been held by some Indian cases[2] that it is the operation of the relevant article which is suspended. According to this interpretation, the only effect of a declaration of a state of emergency is to suspend the power of the courts to declare invalid any laws which violate articles 14 and 15. Once the state of emergency is lifted, those articles can be resorted to, to strike down any legislation which had operated while their use had been suspended. However the liability incurred during the proclamation of a state of emergency cannot be avoided,[3] nor can things done or omitted to be done during the emergency be challenged even after it is over.[4] Moreover it has been emphasised by Indian courts that the emergency declared by the President is in its terms prospective in the sense that it cannot validate, for its purposes, any legislation which was hitherto invalid by virtue of the constitutional provisions the operation of which could form the basis of the interpretation of article 31 (1) relating to situations of a state of emergency in appropriate times in the future.

But the exercise of extraordinary powers under article 31 (1) is not limited to periods under a state of emergency. Such powers may be used in ordinary times, in respect of "individuals who are believed to be conducting themselves in a manner that endangers or compromises national security...."[5] From the plain meaning of this provision it is clear that although provisions for the exercise of extraordinary powers of state both in ordinary times and in a state of emergency appear in the same article, the two are different from each other.

See *Radhakrishna Agarwal v. State of Bihar*, AIR 1977, SC 1496 (para. 25), and *Jaichand Lal v. State of West Bengal*, AIR 1967 SC, 483 (para. 5), as relating to a similar provision in the Constitution of India.

2 *Co-op. S. & B. Society v. Union of India*, AIR 1976 SC 958 (para 26).

Macken Singh v. State of Punjab, AIR 1964 SC 381 (para 8).

See last part of article 31 (1).

This is a peculiar feature of the Tanzanian Bill of Rights. For example there is nothing in the Kenyan Constitution providing for extraordinary powers in ordinary times. There is no such provision in the Indian Bill of Rights either. Generally, there are only four types of emergencies, that is: One, the actual Conduct of War or preparation to meet its occurrence, including internal rebellion or war of an international kind; two, there is the threat of internal subversion, which may often be, but not necessarily related the first to category; three, there is emergency caused by a breakdown or potential breakdown in the economy; and four, other serious states of national disturbance such as where there are riots and great natural catastrophes such as fires, floods, and strikes in strategic services and industries.[1]

The Tanzanian law in this regard is peculiarly superfluous. One cannot contemplate the real objective of this provision, apart from a strong intent of the Tanzanian executive to assure itself of absolute capacity to have control over all individuals at all times. If anything, the same amounts to retaining through the back door the absolute exercise of the powers of detention under the old Preventive Detention Act 1962.[2] Moreover these excessive powers are so camouflaged in article 31 that even the critical eyes of the Nyalali Commission[3] failed to see and list them among the forty laws recommended for repeal for being a threat to basic rights.[4] And sadly, not a single academic analysis on this subject in Tanzania has ever noted this unfortunate anomaly.

However, the High Court on its part, without addressing itself to the real problem involved, has taken trouble to determine the scope of the derogation made by article 31 on the grounds of safeguarding national interest. Justice Mwalusanya deliberated on the issue whether some provisions of section 148 of the Criminal Procedure Act 1985 restricting the

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Groves, 1961: 1.

See the Preventive Detention (Amendment) Act, 1985, Act No. 2 of 1985, imposing limitations on the President's exercise of discretion. Note that the amendment followed only a few months after the introduction of the Bill of Rights.

Commission on the Establishment of Multi-Party Democracy in Tanzania.

NCR, 1991a.

power to grant bail in criminal trials, could be saved by article 31 of the Constitution in the interest of national security in the case of *Daudi s/o Pete v. The United Republic of Tanzania.*[1] He noted that for a law to be allowed by article 31 (1) to curtail the right to liberty on security grounds, it had to pass a criterion established by clause (2) of the said article. This requires that such law has to be "necessary and reasonably justifiable for containing the conduct of that individual".[2] According to the court, relying heavily on the English case of *R. v. Secretary of State for the Home Department -ex parte Ruddock,*[3] and an Indian case of *Peoples Union for Democratic Rights v. Ministry of Home Affairs,*[4] such criterion can only be satisfied if the court is allowed to act on evidence.[5]

Unfortunately the Court of Appeal of Tanzania, in the same case on appeal,[6] did not fully deliberate on the decision and reasoning of the lower court, holding that article 31 was irrelevant to the facts of the case. It is not clear whether by merely saying thus, the lower court's reasoning was thereby reversed, although their Lordships seem to have stated, contrary to the lower court's position, that the whole process was not a matter of evidence but a question of law.[7] However for purposes of human rights development, whether or not the lower court's position is still valid is insignificant, for the judge in that case did not address himself to the core problem of article 31 as we have discussed above. The court still took for granted the validity of, and seemed to see no problem with the taking away of freedom and personal liberty of individuals in ordinary times, if the requirements of article 31 (2) were met. The exposition of this distinction is important and the law made for these purposes is clear about it.[8] From its Preamble it is apparent that the exercise of the

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High Court Miscellaneous Criminal Cause No. 80 of 1989, Mwanza Registry - unreported.
See typed copy of ibid. at p. 20.
(1987) All E.R. 518, at p. 527.
(1986) L.R.C. (Const) 546.
Supra
Director of Public Prosecutions v. Pete, [1991] L.R.C. (Const.) 553.
Ibid:
The Emergency Powers Act, 1986, Act No. 1 of 1986, which came into operation on 2 April 1986.

emergency powers may only occur during a state of emergency. The term "emergency" is defined as including:

> "...War, invasion, insurrection real or apprehended, or a breakdown of public order, which in the opinion of the President is a threat to the security of the United Republic, or a riot or other disaster or a natural calamity within the United Republic whether caused by natural causes or otherwise, which could achieve such a serious nature as to be a national concern".

The type of situations listed above obviously exclude ordinary times. In any case, it should be impressed here that until the courts boldly make in-roads into these peculiar powers reserved in article 31, the article will remain a serious threat to the smooth operation of the relevant provisions of the Bill of Rights. However restrictions of individual liberty may be justified on the grounds of necessity, and also when the use of such powers is subject to necessary limitations.

9.4.2. Restrictions to Emergency Powers.

The exercise of emergency powers is restrictive in its very nature. A proclamation of the existence of a state of emergency in the United Republic or in any part of it, is reserved for only the President to make.[1] But the President has no absolute discretion as to the continuance of a state of emergency he declared. He is required to send a copy of such proclamation to the Speaker of the National Assembly who, after consultation with the Leader of Government Business in the House, must summon the Assembly into session within fourteen days to consider and deliberate on the proclamation. The state of emergency will be valid only if the National Assembly passes a resolution, by a two-thirds majority, supporting its proclamation.[2] By any means fourteen days is a reasonable time for the

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See article 32 (1) of the Constitution of the United Republic of Tanzania.

Article 32 (3) of ibid., as was amended by section 11 of the Eighth Constitutional Amendment Act, 1992, (No. 4 of 1992).

preparation of a session of a House of any Parliament,[1] and the need for a two-thirds majority is sufficient counter-balance to the Presidential prerogative, particularly in a multi-party House.

Indeed apart from factual matters, the National Assembly in its deliberations will have to be guided by the criteria for the exercise of Presidential powers in this regard, as are set out in article 32 (2), that is, he cannot proclaim a state of emergency unless:

"(a) the United Republic is at war; or
(b) the United Republic is in imminent danger of invasion or involvement in state of war; or
(c) there is actual breakdown of Public Order and public safety in the United Republic or any part of it to such an extent as to require an invocation of extraordinary measures to restore peace and security; or
(d) there is a clear and present danger of an actual breakdown of public safety in the United Republic or any part of it which cannot be avoided except through the invocation of extraordinary authority; or
(e) there is an imminent danger of the occurrence of some disaster or natural calamity threatening the community or section of the community or a in the United Republic; and
(f) there is some other kind of public danger which clearly constitutes a threat to the state of its continued existence."

Furthermore the President in the exercise of emergency powers must be guided by the provisions of the Emergency Powers Act, 1986.[2] Although this Act allows the President to delegate his powers in this regard to Regional Commissioners and District Commissioners as specified authorities, it meticulously sets out stiff conditions, particular limitations, and adequate safeguards for the exercise of such power, over and above those in the Constitution. Moreover, even if the President's proclamation of a state of emergency is ultimately approved by the National Assembly, the President's discretion as to its life-span is further limited by article 32 (5) (d). This provision empowers the National Assembly, at any time to pass, by a two-thirds majority, a resolution revoking the continuance of a state of emergency

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The Indian period of limitation in a similar provision is 30 days. See clause (5) of article 352 of the Constitution of India. In the Kenyan Constitution it is 28 days. See sub-section (2) of section 84 of the Constitution of Kenya.

Act No. 1 of 1986.

which the President has no desire to revoke in his discretion under sub-clause (a) of the same clause.

Indeed one can say that the above-stated limitations of the President's powers to proclaim a state of emergency only serve to expose the draconian character of the other powers exercised in ordinary times under article 31. Whereas the exercise of such powers may have the same effect of denying personal liberty and freedom as those exercised during a state of emergency, surprisingly the strict limitations discussed above only apply in respect of the latter, which is indeed disturbing. It behoves us now to move to a discussion of even wider intra-legal limitations of the operation of the Bill of Rights.

9.4.3. The Limitations Under Article 30.

The general limitation clause in the Tanzanian Bill of Rights is article 30 (1) of the Constitution which states:

> "The rights and freedoms whose basic contents have been set out in this Constitution shall not be exercised by any person in such a manner as to occasion the infringement or termination of the rights or freedoms of others or the public interest".

Briefly stated what this clause does is to introduce a criterion which imposes a precondition for the enjoyment and enforcement of the rights entrenched in the Constitution. It requires the striking of a balance between individual interest on the one hand, and the interest of others and/or the public on the other.

Moreover sub-article (2) of article 30 goes on to amplify on the instances amounting to the public interest, about which law cannot be invalidated on account of the Bill of Rights provisions. In clause (a) thereof, the individual versus others/public interest is specifically set out. Then in clause (b) particular situations of public interest are listed as including the interests of defence, public safety, public order, public morality, public health, rural and

urban development planning; the development and utilisation of mineral resources; and the development or utilisation of any other property in such manner as to promote the public benefit. Indeed one can say that this clause seems to exempt laws related to all public activities of both the central and local government which, ironically, are closely associated with sensitive private interests, thus eroding the whole essence of the enforcement of the Bill of Rights.

Apart from that, clause (c) and (d) are intended to promote the well established law and practice of the inviolability of court process and proceedings, and therefore are certainly superfluous. And clause (e) is offensively repressive, for it expressly outlaws the challenge of any law encroaching upon the right of the people to associate and organise in social societies and private companies, making one wonder as to what was really intended by the entrenchment of article 20 of the Constitution.

It should be noted that although ideally the powers of the President under article 31 are immense in their practical effect, it is the limitations under article 30 which are the real negation of the substance of the Bill of Rights. The negative effect of the proclamation of a state of emergency under article 31 is restricted to the suspension of the operation of the rights enshrined in articles 14 and 15 only. But the limitations in article 30 are intended to affect the whole of the Bill of Rights whenever appropriate. The other distinction between these two sets of limitations relates to the proliferation of authorities capable of involvement in the derogation process in the case of the latter. In the case of the former, the President[1] having the duty to justify his declaration of a state of emergency, is certain to be the person behind any sensitive enactment to that effect. But the limitations under article 30 allow the use of not only Principal Legislation but also Subsidiary Legislation made by Ministers, Local Government and other public authorities to that same effect. Certainly this is bound to increase the frequency of derogation which, ironically, does not have any limitation as to

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[1] Or the very limited specified authorities to whom such powers are delegated under s. 5 of the Emergency Powers Act, 1986.

duration and scope of the occurrence of a state of emergency. It is this which calls for a lot of concern against the limitations comprised in article 30.

9.4.4. The Effect of Derogation Clauses.

Derogation clauses are mere mechanisms used by the state in its bid to water down the rights entrenched in the Constitution. Nevertheless in Tanzania the wishes of the state have not been fulfilled, as the said limitations have not inhibited the courts in the enforcement of the Bill of Rights. And it should be noted that some principles developed in other jurisdictions and at the international level have started to influence the interpretation of derogation clauses in a way that does not defeat entirely the objectives of the Bill of Rights. Following are some of the principles developed elsewhere which are likely or have already influenced Tanzanian courts in this regard.

The balance between individual interests on the one hand and the interests of the public or of others on the other hand, has already been considered by the European Court of Human Rights. It was held that: "although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance has to be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".[1] Here `democracy', which has been defined by the same court to include the qualities of pluralism, tolerance, and broadmindedness,[2] is taken to be the criterion for establishing the scope of the above-mentioned balance. Indeed what it goes to emphasise is a wider assumption that it is only in a democratic social environment that human rights can be effectively enjoyed, preserved and promoted.

Young and Webster v. UK. (1982) 4 E.H.R.R. 38, as cited by Ghai, 1995: 36.
Handyside v. U.K. (1976) 1 E.H.R.R. 737, as is cited by Ghai in ibid.

As to the phrase "reasonably justifiable", this has been taken by the European Court to "mean that there should be a rational connection with a permitted ground for limitation and that every formality, condition, restriction or penalty must be proportional to the legitimate aim".[1] This establishes the principle of proportionality, of which the test is "whether the interference complained of corresponds to a `pressing social need', is it proportionate to the legitimate aim pursued".[2] That is to say, whether the reasons given by the national authorities to justify a limitation are relevant and sufficient.

The principle of proportionality has invariably been associated with the principle of legality or rule of law, which incorporates the idea that "a provision to be `law' must have a basis in law, must be accessible to the public and must be clear so that those affected by it can guide their conduct by it".[3] However, from the scope of the principle of legality must be excluded, broad, general or vague laws, for:

> "laws must provide explicit standards for those who apply them. A law which gives too much discretion to an official may also fail the test of clarity, for it does not enable the public to know the purposes for which the law may be used. It may also mean that the discretion could be used for an improper purpose. The law must be fair and reasonable in the sense of procedural due process. It must bear some proportion to its objectives".[4]

Basically the principle of proportionality establishes standards to which all potentially derogation laws must conform. While the courts may not dispute the wisdom of constitution makers to include some clauses limiting the enforcement of some rights, they may still test particular pieces of legislation in appropriate cases to ensure their compliance with the accepted standards of law. Let us now try to establish whether Tanzanian courts have followed the approaches illustrated above.

Ibid: para 49.

Ghai, ibid.

Ghai, ibid., summarising the principles established in *Sunday Times v. U.K.*, supra, *Barth v. Germany* (1984) E.H.R.R. 82 (Commission),and (1985) & E.H.R.R. 383 (Court), Malone v. U.K. (1985) & E.H.R.R. 14, *Kruslin v. France* (1990) 12 E. H.R.R. 587, *Ong Ah Chua V. Public Prosecutor* [1981] A.C. 648 (Singapore) and *Maneka Ghandi v. Union of India,* AIR 1978 SC 597.

9.4.5. Interpretation of Derogation Clauses in Tanzania.

In the academic human rights discourse in Tanzania, it is possible to distinguish two views as regards limitation clauses. The first is the one which sees the effect of these provisions as a total negation of the overall impact of the Bill of Rights. Let one of the proponents of this school speak for himself, thus:

> "What then, one wonders, is the need for providing in the constitution for the right to a fair hearing and the right to be presumed innocent until proved guilty when the Preventive Detention Act empowers the President to detain any person without trial? What then is the use of guaranteeing in the Constitution the right to appeal when such right has been displaced in other laws of the country such as the Expulsion of Undesirables Ordinance, the Deportation Ordinance, the Preventive Detention Act or the Collective Punishment Ordinance? How can there be freedom of movement when one cannot move freely without carrying a bundle of identity cards?".[1]

This writer is resigned in despair that he cannot see what may be achieved by a Bill of Rights which gives rights by one hand while taking them away by the other. It is in that context that he concludes that the Bill of Rights is "so well `punctured' with numerous saving (sic) and exemptions that [it] has been rendered an empty shell".[2] Indeed this school does not see any future in the Tanzanian Bill of Rights within the prevailing circumstances of the operation of so many violative laws which are said to have created in the country, "a suffocating legal climate".[3]

The other view is not so dismissive of the impact of the Bill of Rights. Although it has strong reservations as to the existence of claw-back clauses within its content, the Bill of Rights is seen with great optimism as the beginning of the long journey towards a bright human rights future in the country.[4] Thus this school puts all hopes in the capacity of the

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[1] Mwakyembe, 1985: 49 - 50.
[2] Ibid: 49.
[3] See Shivji, 1991a.
[4] See Mwaikusa, 1991: 693.

courts to articulately instil life in the Constitution, by applying wide and liberal interpretation of claw-back clauses in favour of the complaining individuals. In this vein, although Mbunda, one of the advocates of this school, disapproves of the excessive circumscription of rights in what he baptises as `Bill of Exceptions', he still thinks the "courts of law have an important role to play in terms of promoting and protecting fundamental rights".[1] As to the role of courts as guardians of liberty, the writer has this to say, thus:

> "At the same time, the Bill of Rights states circumstances where infringement of rights and freedoms is allowed. This will require the judges to articulate the fundamental values of society and set their order of priority. The judges will have to decide whether a given societal value is more important than one or other of the guaranteed fundamental rights and freedoms. These are policy decisions requiring value judgement".[2]

One has to take note that both of the views discussed above were in fact predictions made within a few years of the entrenchment of a Bill of Rights in the Constitution of Tanzania. Of the two, the courts have so far taken the second view. This was clear in the very first High Court case to be decided on the basis of the Bill of Rights, *Chamchua s/o Marwa v. Officer i/c Musoma Prison and the Attorney General.*[3] In that case, while dismissing Mwakyembe's pessimism mentioned above, Justice Mwalusanya categorically stated that the position was "not such black". (p. 6)

Then on the basis of the statement of the late Mwakasendo J.A. in an earlier case,[4] to the effect that the liberty of an individual was so precious as not to be taken away except by express provisions of the law, the judge emphatically held that:

> "...it is a well known principle of statutory interpretation that an Act of Parliament must be presumed to be *intra vires* the Constitution. However once the applicant shows that a piece of legislation is *ex-*

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[1] See Mbunda, 1994: 147 - 8.
[2] Mbunda, 1988: 153.
[3] High Court Miscellaneous Criminal Cause No. 2 of 1988, Mwanza Registry - unreported.
[4] *A.G. v. Lesinoi Ndeinai & Others*, (1980) T.L.R. No. 214, at p. 239.

> *facie ultra vires* the Constitution, then the onus shifts on the state to show that, that piece of legislation is saved by the saving provisions".

From the above-quoted statement, it is clear that although this decision was opening the doors to some liberal and purposeful interpretation of derogation clauses, the judge did not seem to see anything wrong with their existence within the Bill of Rights. This position is also shared by the Court of Appeal of Tanzania, which did not mince words when it partly held in *Director of Public Prosecutions v. Pete*,[1] that "such limitations to basic rights are not unique to Tanzania. They are inherent in any society and are found in many Constitutions and legal systems".[2] The same was further cemented by the Court's statement that "any legislation which falls within the parameters of article 30 is constitutionally valid", that is if it merely fits "squarely within the provisions of the Article". (p. 572) This indeed was the grant of legal legitimacy upon this constitutional anomaly.

The above is a lame approach towards human rights promotion by Tanzanian courts. That such clauses exist in many other constitutions does not say anything about other constitutions which do not have them, the best example being the Constitution of the United States of America.[3] It would better serve the human rights cause in the context of the current struggles in Tanzania for wider democratic governance, if the courts were brave enough to make a frontal attack not only against the substance of derogation clauses, but also and more important, against the justification of including them in the Bill of Rights. It is only that kind of approach which can be said to amount to meaningful judicial activism, different in quality from the positivist and natural justice-oriented approach which the courts in Tanzania seem to have committed themselves to.

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[1] [1991] L.R.C. (Const.) 553 at p. 562.
[2] Ibid.
[3] The Constitution of the United States of America does not include claw-back clauses in the relevant Amendments which proclaim fundamental rights which are stated in as few words as possible, leaving any impositions of the necessary limitations thereof, for the Courts of law to do, in specific cases. See also "The Charter of Rights", Schedule I of CBB, 1991: 14.

But what is more interesting is the fact that some principles seem to be developing out of the few cases so far decided. The initiative in the direction was forcefully shown by Justice Mwalusanya in the *Chamchua Marwa* case.[1] One important decision His Lordship made in this case, was his adoption of the Siracusa Principles of 1984 and the Limburg Principles of 1986, a set of rules made under the auspices of the International Commission of Jurists,[2] to guide the interpretation of limitation clauses found in any national constitution. According to the judge, these principles "should be adopted in Tanzania by our courts in interpreting the Constitution, if the Bill of Rights is not to exist in theory only". (p. 7)

The principles are in three sets. The first deals with General Interpretative Principles Relating to the Justification of the Limitations. The second is about limitations based on the phrases 'in accordance with the law'. And the third relates to limitations based on the phrase: 'in the interest of public safety, public order'.

The same judge did in fact repeat his commitment to the above principles in respect of the question of burden of proof, in the case of *Daudi s/o Pete v. The United Republic of Tanzania.*[3] But this time, he underscored the justification for adopting the same on the basis of a resolution of the Bagwati Colloquium,[4] which urged for among others, a great need "... for judges in all countries to look, to international legal development and drawing upon them in the course of developing the solution which they offer in particular cases that come before them, even if international legal instruments are not coercive of municipal law".[5] According to the judge, Tanzania should lead the way in that direction.

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[1] Supra.
[2] See *Review*, Magazine of the International Commission of Jurists: No. 36 of June 1986, p. 47 for the Siracusa Principles, and No. 37 of December 1986, at p. 43 for the Limburg Principles, as were referred in the Judgment.
[3] High Court Miscellaneous Criminal Cause No. 80 of 1989, Mwanza Registry - unreported, at p. 12 of the typed copy of the judgment.
[4] "Judicial Colloquim of Commonwealth Judges" held in Bangalore, India (24 - 26 February 1988), as referred to in ibid.
[5] Ibid.

This important reasoning of the High Court has not been confirmed by the Court of Appeal, as the relevant appeal was struck off the Register before judgment, at the instance of the Appellant, the Attorney General. And although as we mentioned above, the Pete case in the High Court touched upon the above principles in relation to the question of burden of proof, their Lordships on appeal were silent about this matter. And as no other judge of the High Court has so far supported Justice Mwalusanya on this question in another case, it cannot be concluded as yet that the rules might have formed part of the human rights law in Tanzania. And if that were true, the same could have formed the base for the launching of a frontal attack against the existence of limitation clauses in the constitution, at least on the ground of absence therein of adequate safeguards against arbitrary laws and remedies against abuse. However, whether or not it is through the influence of the above, it is already possible to identify the development of some principles in this regard in Tanzanian courts, albeit still at a budding stage.

9.4.6. Developing the Canons of Interpretation of Limitation Clauses in Tanzania.

Among the canons of interpreting limitation clauses which seem to have taken root is the principle of proportionality. This is meant to be used in striking the necessary balance between the interests of the individual and those of others or of the public, characteristic of article 30 (1). The Court of Appeal of Tanzania in the Pete case, referred to this balance as one of the important principles or characteristics to be borne in mind when interpreting the Constitution, that it is "a corollary of the reality of co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective and communitarian rights and duties of society on the other".

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[1] High Court Miscellaneous Criminal Cause No. 80 of 1989, Mwanza Registry - unreported, at p. 12.
[2] [1991] L.R.C (Const.) 553, at p.566. For the similar views of the Chief Justice see his academic presentation, in Nyalali, 1991.

The main concern is how the courts in Tanzania have dealt with the above seemingly complex balance, in the process of enabling the enforcement of the Bill of Rights provisions in particular cases. In *Daudi s/o Pete v. United Republic of Tanzania,* the High Court introduced the proportionality principle as a means for striking the balance between individual and public interests. Justice Mwalusanya identified two tests. Finding inspiration from the Canadian case of the *Queen v. Big M. Drug Mart Ltd.*, he established the first test as having to do with the legitimacy of the impugned legislation, while the second looks at the question as to whether the means adopted by such legislation bear a reasonable relationship to the object thereof.

The Court of Appeal on the other hand, without using the phrase `proportionality', in the Pete case treaded on the same lines, ending with what may be referred to as the 'harmonisation principle', in order to solve the `co-existence of the individual versus society' riddle mentioned above. According to their Lordships:

> "...the merits and demerits of any legal system in so far as the question of human rights is concerned depend upon the extent to which a particular legal system succeeds or fails to harmonise the basic rights and freedoms of the individual on the one hand, and the collective or communitarian rights and duties of society on the other".

Unfortunately the court did not choose to elaborate as to how such harmonisation may be achieved. And indeed it did not go on to deliberate on the two tests for establishing proportionality as was put forward by the lower court. Instead a different test with the same effect was enunciated, and this requires a statute wishing to be saved by article 30 of the Constitution, not to be "so broad as to fall partly within and partly outside the parameters of the Article", or so broad as to be like "the Kiswahili proverbial rat-trap which catches both rats and humans, without distinction".

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[1] High Court Miscellaneous Criminal Cause No. 80 of 1989, Mwanza Registry - unreported, p. 12 .
[2] (1986) L.R.C. (Const) 332.
[3] [1991] L.R.C. (Const.) 553, at p. 572.

It is difficult to say with certainty whether the Court of Appeal in the Pete case did uphold the proportionality principle as was set out by the lower court. Yet the rat-trap test seems to be gaining ground, as it has been used by all subsequent cases dealing with this matter, both in the High Court and the Court of Appeal. In the High Court, Justice Mwalusanya did in Peter Ng'omango v. Gerson M.K. Mwangwa and the Attorney General, subscribe to the Court of Appeal's rat-trap test, considering it akin to his proportionality test (p. 5). The test was also applied by the late Justice Mkude in the case of Re: Application for Bail - Ally Mohamed Liheta, and Justice Munuo in Lohay Akonay and Another v. The Hon. Attorney General, although the latter seems to have introduced a dubious concept of 'reverse discrimination'.

But it is in the other Court of Appeal decision of Kukutia Ole Pumbun and Another v. The Hon. Attorney General and Another, that the rat-trap test was ultimately re-confirmed, and indeed clarified. First the court came out more clearly about the harmonisation process, indicating, in the words of Kisanga J.A. that:

> "In trying to achieve this harmony, the view has been that in considering any act which restricts fundamental rights of the individual, such as the right to free access to the court of law in this case, the court has to take into account and strike a balance between the interests of the individual and those of society of which the individual is component".

And the court went on to emphasise that its decision in the Pete case had made two requirements:

> "First, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. The principle requires that such law must not be

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[1] Ibid.
[2] High Court Civil Case No. 22 of 1992, Dodoma Registry - unreported.
[3] High Court Miscellaneous Criminal Cause No. 29 of 1991, Dar Es Salaam Registry -unreported.
[4] High Court Miscellaneous Civil Cause No. 1 of 1993, Arusha Registry - unreported.
[5] [1993] 2 L.R.C. 317.

> drafted too widely so as to net everyone including even the untargeted members of society. If the law which infringes a basic right does not meet both requirements such law is not saved by article 30 (2) of the Constitution, it is null and void". (p)

Moreover the court has come out more forcefully to direct that "any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms with these requirements, otherwise the guaranteed rights under the Constitution may easily be rendered meaningless by the use of derogatory (sic) or clawback clauses in that very constitution".

Undoubtedly in the Pumbun case, the Court of Appeal has not only clarified the effect of limitation clauses, but also married the articulation of the principles involved in their interpretation in the High Court to those of the Court of Appeal. But more specific, is the elaboration of the principle of legality, answering the question as to which are the laws which may be allowed to infringe the rights provided in the Bill of Rights by the authority of article 30. Thus the requirement as to the absence of arbitrariness, presence of adequate safeguards against arbitrary decisions and control against abuse by those in authority using the law, exactly tally with the High Court's position in the Marwa, Daudi s/o Pete and Ng'omango cases. Briefly it amounts to subjection of such derogation laws to the principles of natural justice.

After the Pumbun decision, one can say that the law is now certain that in Tanzania limitation clauses are mere paper-tigers with little effect as to the enforcement of human rights through courts of law. Nonetheless this should just be the beginning of a long journey towards the establishment of wider rules moving the courts from the present position, which

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[1] Ibid.

[2] Cases decided after *Pumbun* following the same rules include, the Court of Appeal decision in *Mbushuu @ Dominic Mnyaroje and Another v. Republic*, Criminal Appeal No. 142 of 1994 unreported - This case is now reported in L.R.C. and the High Court case of *Rev. Christopher Mtikila v. The Attorney General*, Civil Case No. 5 of 1993, Dodoma Registry - unreported.

acknowledges as prima facie justified, the existence of limitation clauses in the Bill of Rights.

9.4.7 The Bill of Rights and Duties.

The last important feature of the Tanzanian Bill of Rights is the fact that within its provisions, it has also set out a number of duties requisite of an individual to perform for his community or society in general. This has led to it being referred to as the Bill of Rights and Duties. The Court of Appeal of Tanzania in the Pete case, has rightly noted that the Constitution of Tanzania, unlike "most constitutions of the West recognises and guarantees basic human duties". (p. 565) And thus in an attempt to compare this part of the Constitution with Part IVA of the Constitution of India also comprising 'Fundamental Duties', the court has also correctly noted their difference in two aspects that is in the words of their Lordships:

> "First, the fundamental and basic duties recognised by our Constitution are attributed to human beings, whereas those under the Indian Constitution are attributed to Indian citizens only. Second, under the Constitution of India, fundamental rights are dealt with in a separate part of the Constitution (Pt III) and fundamental duties in another separate part (Pt IVA). In our situation, both fundamental or basic rights and duties are dealt with in one single part of the Constitution, that is Pt III". (p. 565)

There is nothing strange for a list of the duties of an individual to his society, to be included in a national constitution. What is innovative in the Tanzanian law is the inclusion of both rights and duties in the same Bill of Rights.

However, what is at issue here is the object intended to be served by this formal or legislative creativity. In the opinion of the Court of Appeal in the Pete case, the same is "a symbolism and expression of a constitutionally recognised co-existence of the individual human being and society, as well as the co-existence of rights and duties of the individual

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[1] See articles 25 - 28.

and society". (p. 565) In this view the court may have been influenced by the conviction of the Chief Justice expressed more than four years earlier in an academic presentation, wherein, speaking of the co-existence of rights and duties, he had stated:

> "First, it is recognised that human beings do have two basic capacities, that is - every human being exists both as an individual and as a member of a community to which he or she belongs. In the capacity of an individual, every person is construed to have basic rights against all others; but as a member of the community, such person is seen to have basic duties towards others in the community. The corollary of this position is that the community on its part also have basic rights and duties towards its members. In other words, rights and duties are inter-dependent and there is a similar interdependence between rights and duties of every individual person on the one hand and rights and duties of the community to which he belongs on the other hand".

Then using the example of a habitual offender losing his constitutional right of receiving from the state protection of his property, the CJ argued that, "...one's failure to perform relevant basic duties under the Constitution may be raised as a good defence against one's claim to enforce certain basic rights".

This indeed is the main mission of the inception of a list of duties within the Bill of Rights. It is intended to compromise the effective enjoyment by individuals of the rights provided. However it is important to consider the essence and history of the Bill of Rights concept. That it is the story of a conflict of the weak individual both in person and in society, against the omnipotent state whose existence itself has a lot to do with the preservation of the public interest. In short, as the basis of all law is the public interest, there is no justification at all for the guarantee of duties to the community or society in a Bill of Rights, whose raison d'etre is the vindication of the individual against the oppressive public in the form of the state.

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[1] Op. cit.
[2] Ibid. p. 1.
[3] Ibid.
[4] See also Mwakyembe, 1985: 49. Surprisingly Peter, 1990, when discussing the co-existence of rights and duties in the Bill of Rights does not seem to see this point.

One has to look at the duties provided to see the problem involved. Take an example of article 28 which provides for duties in relation to national defence. It confusedly sets out both as a right and duty to "defend, protect and promote the independence, sovereignty, territorial integrity and unity of the nation". The use of the word 'duty' empowers the State to compel military service or conscription for whatever ends, to the detriment of at least the right to freedom of movement. Similarly it seems apparent from article 28 that there is a hidden agenda on the part of the State to suppress the right to self-determination of the people within the United Republic wishing to break away for whatever reasons. Indeed these hidden motives make this constitutional innovation potentially draconian and, on that account, undesirable.

The other important thing to note here is the influence of the African Charter on Human and Peoples' Rights about the imposition of duties on an individual, of which the Court of Appeal did appreciate. Speaking positively about the philosophy comprised in the Preamble to the Charter, especially the consideration of "the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights", the court decided to commit itself to the same philosophy in interpreting the provisions of the Bill of Rights. Unfortunately this is where the court misses the point and fails to take into account the fact that the African Charter had a mission to serve at the time that it came into existence.

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[1] See Mwakyembe, 1985: 49. Peter, 1990, suggests as the background of this provision the experiences of the Uganda War of 1977 - 79, which was won not only by the use of regular forces, but mostly as a result of massive voluntary service.

[2] Indeed the right to self-determination is not expressly provided in the Bill of Rights. Peter, in ibid, also sees as the background to article 28, the removal from office in 1984 of Aboud Jumbe, the former President of Zanzibar and the Union Government vice-president, for allegedly supporting anti-union sentiments.

[3] *Pete* case, supra.

[4] The Charter's Preamble as is cited in ibid: 565.

[5] Ibid: 566.

[6] Supra, Chapter Five.

In this chapter it has been attempted to chart out and critically evaluate the main features of the Bill of Rights, which make it different from other similar instruments. One can generally conclude that the rights provided are restrictive. It has also been illustrated how courts have begun to manoeuvre through the limitations comprised in the Constitution itself, in a bid to make the instrument both workable and meaningful. Yet although one sees some bright light at the end of a long tunnel, there is a lot to be done by the courts, in view of getting out of the cocoon of legal positivism, for a much wider outlook of the Bill of Rights as part of a bigger struggle for democratic emancipation.

CHAPTER TEN

The Bill Of Rights And Political Rights In Practice

"Quod cumque suis mutatum finibus exit continuo est illius quod fuit ante"

Latin phrase quoted from Lucretius' *De Rerum Natura* by Salman Rushdie[1]

10.0. Background Introduction.

This chapter deals with how the recently effected constitutional changes affected political rights in the Bill of Rights. Focus is directed to the impact of the reforms on the electoral process. The next chapter will dwell on political association. The constitutional legitimacy of the one-party system and the state-party analysed in Chapter Eight were based on articles 3 and 10 of the Constitution. Article 3 which provided for the one-party state had been enacted for the first time by the Interim Constitution of 1965 (art. 3 (1)). The same had also provided for partial party supremacy, that is in all political activities except in respect of executive organs of state and local government (art. 3 (3)).[2]

At the height of the state-party in 1977, the Permanent Constitution made significant changes to article 3. Not only did it declare the one-party state, but also it committed the country to the ruling party socialist ideology. It also mentioned CCM as the sole political party in the United Republic. (art. 3 (3)) Then a new article 10 was introduced to provide for full-scale party

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[1] Rushdie, 1988: 276. In English it reads: "Whatever by its changing goes out of its frontiers, that thing by doing so brings immediate death to its old self."

[2] Note that the exception was removed by the interim constitution (Amendment) Act 1975, Act No. 8 of 1975, which meant the effective and formal introduction of full-fledged "Party supremacy" doctrive.

supremacy. It confirmed the party is final role and authority in all political matters without exception.[1]

By the above constitutional provisions, the people were denied the right to spearhead by their own initiatives, any organisation relating to the social welfare of their communities. Undoubtedly the provisions were in contravention of political rights in the Bill of Rights (arts. 20 & 21). Therefore a change in the political system was imminent if the Bill of Rights was to make any sense.[2]

This conflict was illustrated by the way the government reacted against the plight of James Mapalala's Movement for the Revocation of the One-Party System.[3] He had peacefully using party organs, demanded for the repudiation of the one-party system.[4] For that, he and his associates were harrassed and ultimately put in preventive detention in 1986. The point made here relates to the over-zealousness of the agents of the government in curtailing political rights using methods described by Shivji as "legal but illegitimate"[5].

However the entrenchment of the Bill of Rights in the Constitution had the effect of opening a Pandora's box in the political system, as the Latin quotation at the commencement of this chapter goes.[6] The contradictions inherent within the one-party system had compelled constitutional changes in 1984, one of which was the introduction of the Bill of Rights. By the very nature of the human rights discourse there was no way that the effect thereof could be contained within the "banks" of the basically authoritarian one-party political system. The Constitution had to be amended not only in terms of the quantity of the provisions involved, but

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[1] Ibid.
[2] Nyalali, 1991: 5. See Peter's contrary position in Peter, 1990: 30.
[3] Peter, 1990: 31.
[4] He wrote three successive petitions to the NEC of CCM. See Myungi, 1986; Also the Mapalala, 1992 interview with the author; and *Ex Parte James Mapalala and Athumani Udindo*, High Court Miscellaneous Criminal Cause No. 30 of 1986, Dar Es Salaam Registry - unreported.
[5] Shivji, 1990: 43 - 66, , Chapter Three.
[6] For the full translation thereof see supra.

indeed qualitatively too, because of the substantial political consequences the same had to the body politic. Yet the government's willingness for change would not come the easy way.

The factors which coerced it to submit to the popular demands included the general democratisation trend in the World following the collapse of the socialist regimes in Europe by the end of the 1980s. In the African context these changes translated themselves into a common theme that is:

> "an attempt to institute plitical plouralism and democratic rule in place of the single-party dictatorships and autocratic oligarchies that had become the political order of the day in all but a handful of african States and to build a political culture founded on a conception of human rights now taken for granted in the more established democracies"[1]

What this entails is that African endeavours to re-institute democratic rule do not end with the introduction of pluralism. However it is not true that multi-party politics guarantee democracy, for saying so would be to confuse form with content.[2] We have also discussed the effects of the economic crises in Chapter Eight.[3] Within the above context, the significance of the Law Society Seminars of 1983 and 84 cannot be belittled. For the first time in the history of post-independence Tanzania, critics were able to speak out their minds. They also formed the nucleus of political actors who later became the leaders of the opposition.[4]

Yet by the beginning of 1990, the government of Tanzania was still opposed to discarding the one-party system. They unjustifiably refused the registration, as society, of the

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[1] Maluwa, 1997: 57

[2] Ibid: 70, quoting from Howard, 1992:12 who says: "Human rights are recognised as an essential aspect of democracy. Democracy is represented by one of its manifestations, multi-party elections. Multi-party elections are then thought to automatically imply both democracy and human rights, so that if a country holds such election, it will be fulfilling all its human rights obligations."

[3] Also, See NCR, 1991: 1, para. II (c).

[4] See Peter, 1993.

Civil and Legal Rights Movement of James Mapalala.[1] This was one of a series of government decisions, indicative of the government's reluctance and lack of commitment to the development of an atmosphere of wider democracy. However, in February 1990 retired President Julius Nyerere, the former Head of the authoritarian party-state, openly declared that it was not a sin to discuss the multi-party option. Public opinion in favour of pluralism was beginning to have impact, and by the end of the year the government conceded.

On 27 February 1991, the President appointed a Commission for the Single and Multi-Party System in Tanzania (hereinafter referred to as the Nyalali Commission). This commission comprised 23 members, including its chairman the incumbent Chief Justice of Tanzania, Francis L. Nyalali.[2] The terms of reference were extensive but generally it involved the task for the Commission to find out the possibility, advantages and overall implications of the establishment of the multi-party political system.[3] And the main objectives of the project was at least in theory the govenment's commitment towards the "expanding, entrenching and the building of a culture of democracy in the country...".[4] Furthermore, the President made specific directions as to the execution of the above terms of reference, including that it should complete its assignment within one year.[5]

On 17 February 1992, the Commission submitted to the President its report which, apart from recommending the establishment of a multi-party political system, emphasised the desirability of expanding democracy, indicating thus:

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[1] Supra.

[2] The other members were, the late Abdulwalid M. Borafia as Vice-Chairman, Julius Sepeku as Secretary, and other ordinary members including Tito M. Budodi, the late Ambassador Wilbert K. Chagula, Wolfang Dourado, Ussi K. Haji, Pandu A. Kificho, Hindu B. Lilla, Aboud Maalim, Omar O. Makungu, Pius Msekwa, Juma V. Mwapachu, Ambassador Tatu Nuru, Prof. Haroub Othman, Salim J. Othman, Zaina K. Rashid, Isdore L. Shirima, Ali J.Shamuhina, L. Nangwanda Sijaona, Juma Khiyari Simai, Dr. Kapepwa I. Tambila and Crispin Tungaraza. See NCR, 1991b: 9.

[3] See ibid: 10, para. 3.

[4] Ibid, No. (v).

[5] Ibid: 3 - 4, . para. 4.

> "In the desire to expand democracy in society, the Commission has made many recommendations but the most important thereof is the necessity to ensure the protection of human rights and to guarantee that Parliament/House of Representatives and the courts operate as independent organs. People should have the freedom to form and conduct their own societies and communities without any government interference".[1]

Among the other recommendations, was the immediate reform of some provisions of the Constitution and those of a selected number of laws.[2] But more significant was the call for entrenched constitutional principles, norms and procedures, which may not be easily amended, save by referendum, and the creation in the body politic of the culture of opposition politics. The government generally accepted the Commission's recommendations. Thus the process was set in motion for the holding of multi-party elections in a space of only two years,[3] while committing Parliament to effect drastic amendments to the Constitution and other relevant laws. The *Mageuzi* era had begun.

The Bill for the Eighth Constitutional Amendment Act 1992 was laid before the National Assembly on 30 April 1992.[4] While submitting the said Bill, the then Prime Minister John Malecela indicated as the main purpose of the intended law, "...to make changes in the Constitution of the United Republic, in order to remove the single-party system, and replace it with a multi-party political system, while creating conditions pertinent to the establishment of the new system in the country".[5] Moreover he conceded that this historical development enjoyed an overwhelming support of the people.

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[1] Ibid: para. XX.
[2] See NCR, 1991b, which has listed well over 40 statutes recommended for either total repeal or substantial amendment.
[3] By October 1995.
[4] See Hansard, 1992: 118.
[5] Ibid. Author's English translation from the original *Kiswahili* version.

Thus within a short time the government surprised even the campaigners for human rights and wider democracy, by the speed with which political change was being conducted. Nevertheless this sudden zeal of the government lay a hidden agenda. This was to be illustrated by the way the government carried out the said reforms . It was in a way which negated the overall effect of the very recommendations of the Nyalali Commission and the Bill of Rights in general. This is the concern of the following sections. But let us first examine what the Bill of Rights provides on political rights.

10.1. The Content of the Rights Provided.

The right to political participation is provided in article 21 which, before the Eleventh Constitutional Amendment Act 1994,[1] provided thus:

> "(1) Every citizen of the United Republic is entitled to take part in the government of the country, either directly or through freely chosen representatives, in accordance with the procedure provided or under the law.
> (2) Every citizen is entitled and shall be free to participate in full in the making of decisions on matters which affect him, his livelihood or the nation".

The scope of this section was delineated in the High Court of Tanzania case of *Rev. Christopher Mtikila v. The Attorney General.*[2] It was held that the "citizen's right to participate in the government of his country implies three considerations: the right to the franchise, meaning the right to elect representatives; the right to represent, meaning the right to be elected to the law making bodies; and the right to be chosen to political office". (p. 40) But

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[1] Sub-article (1) thereof was thereby amended following some judicial rulings which we deal with in detail later in this chapter. For the purposes of clarity of argument and understanding of the constitutional developments involved, we proceed here to discuss the replaced provision.
[2] High Court Civil Case No. 5 of 1993, Dodoma Registry - unreported. Hereinafter referred to as the *Mtikila* case.

in addition to that, under article 21 (2) is provided the right of consultation. Every citizen has the right to demand for the government's effective consultation of them, before making important decisions seriously affecting their welfare.

Moreover the provision of the right to political participation was a significant feature of the Tanzanian Bill of Rights. It distinguished it from, for example, that of neighbouring Kenya, or even that of India.[1] The same was evidence of the influence of international law thereto.[2]

Actually article 21 (1) of the Constitution is *in pari materia* with article 13 (1) of the African Charter on Human and Peoples' Rights.

Besides that, more or less article 25 (a) of the International Covenant on Civil and Political Rights makes a provision akin to article 21 (1). But the Covenant is more elaborate on the right to political participation in article 25 (b), which is not found in the other instruments mentioned above. The said right is said to include *inter alia*, the right; "to vote and be elected at genuine periodic elections which shall be held by secret ballot, guaranteeing the free expression of the will of the electors".[3] Therefore in the absence of such express provision in the Tanzanian Bill of Rights, the same can be effectively invoked by the courts, to provide proper interpretation as to the parameters of the right to political participation.

Finally we come to article 21 (2) reproduced above. It is worth noting that one does not find a provision analogous thereto in the international instruments mentioned above, or other related documents.[4] It is indeed an innovation of the Tanzanian constitution, reflective of the Guidelines of the ruling party, CCM.[5] Whether in practice the one-party system allowed free

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[1] Neither the Kenyan Bill of Rights (Chapter Five of the Constitution of Kenya), nor that of India (Chapter Three of the Constitution of India), provide for the right to political participation.
[2] The same influence is seen in a much more recent Bill of Rights in the Constitution of the Republic of Malawi, only about three years old, whose article 38 also provides for the right to political participation.
[3] Such elaborate provision can be seen in the Malawian Bill of Rights.
[4] Not even the very recent Malawian Bill of Rights mentioned above.
[5] See CCM Guidelines 1982.

and unimpeded participation in the public decision-making system is subjected to inquiry in the next section.

10.2. The Right to Political Participation in Practice.

If anything, in its very nature the one-party system itself was the negation of all aspects of the enjoyment of the right to political participation. Take for example the right to take part in the government either directly or through freely chosen representatives.[1] This was marred by the election law itself. The issue is whether in the *Mageuzi* process substantive change has been effected to the right in its aspects mentioned above.

10.2.1. The Right to Stand for Public Office.

Prior to the Eighth Constitutional Amendment of 1992, the relevant article providing for the qualifications for a Presidential candidate had stated as follows:

> "39.- (1) No person shall be eligible for election to the office of President of the United Republic unless he:-
>
> (a) has attained the age of forty years; and
>
> (b) is otherwise qualified for election as a Member of the National Assembly or of the House of Representatives".

Article 67 (1) provided for qualifications for Members of the National Assembly. There were common conditions as had been inherited from the old colonial law.[2] Then were leadership requirements as derived from the ruling party's constitution. But then it was categorically

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[1] Article 21 (1) of the Constitution of the United Republic of Tanzania.
[2] Tanganyika Legislative Council Ordinance of 1926, op. cit.

provided that the contestant must be "a member of the Party who fulfils all membership obligations prescribed in the Party Constitution".[1]

One cannot doubt the importance of the above requirement in a one-party scenario. Similarly one has to appreciate the logic that such requirement cannot have any substance in a multi-party situation. But that was not to be the case with CCM and her government, who still insisted on the requirement of party membership for any person wishing to contest for all elective offices at the local government, Parliamentary and Presidential levels, even after discarding the one - party system. Thus article 39 was made to read as follows:[2]

> "39.- (1) No person shall be entitled to hold the office of the President of the United Republic unless he:-
>
> (a) is a citizen by birth of the United Republic by virtue of the citizenship law;
> (b) has attained the age of forty years;
> (c) is a member, and is a contestant sponsored by a political party; and
> (d) is otherwise qualified for election as a Member of the National Assembly or of the House of Representatives".[3]

Similar provisions were made in respect of contestants for membership of the National Assembly.[4] It was indeed no secret that the above provisions followed the ruling party's directives as was confirmed by the government.[5] Thus defending his party's position while dismissing any rational for the introduction of independent candidates, the Prime Minister had this to say among other things, thus:

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[1] Clause (b) of sub-article (1) of article 67 of the Constitution of the United Republic of Tanzania - now replaced.

[2] Section 13 of the Eighth Constitutional Amendment Act 1992, op. cit. - now replaced by section 5 of the Ninth Constitutional Amendment Act 1992, which amended article 39 to add to the citizenship requirement, citizenship by naturalisation, subject to the concerned contestant's satisfying the condition of having prior to standing for such elective office, been resident in the Republic for fifteen years or more.

[3] Author's English translation of the original *Kiswahili* version.

[4] Section 19 of the Eighth Constitutional Amendment Act, 1992.

[5] See Hansard, 1992: 130.

> "As the Honourable Members of Parliament may wish to know, the object of the requirement that a contestant be a member of some political party is to avoid chaos and disturbances in our country. ...The politics of the country will be guided by political parties and their programmes. The country cannot be so guided by programmes of a single person. (laughter/acclamation). ...If one holds opinions and beliefs which are acceptable to the people but are different from those shared by the present political parties, one has the option of forming one's own political party (laughter/acclamation). It is a party which shall be accountable to the nation by its policies. To do so does not mean standing in the way of a citizen's right to the freedom of political participation, he still may enjoy such freedom if he does exercise the same, through the alternative of political parties as is required. (acclamation)".[1]

However such eloquent justification which seemed to have been well received by the House, did not receive the same appreciation in the High Court. The constitutionality of the same provisions was thereafter questioned in *Christopher Mtikila v. The Attorney General*.[2] It was contended by the Petitioner that the requirement for membership and sponsorship by political parties abridged the right to participate in national and public affairs guaranteed by article 21 (1) of the Constitution. The court was thus invited to strike out paragraph (d) of article 39 and wherever else the requirement for membership and sponsorship by a political party occurred. It was held that article 39 was constitutionally valid in terms of the requirements of article 98 (2) of the Constitution. But it was emphasised that this did not mean that the same were free from difficulties. (pp. 21 - 25) The court pointed out that article 21 (1) was very wide, as in its wording it addressed itself to "every citizen". Thus according to the judge:

> "It could easily be said "Every member of a political party...", but it did not, and this could not have been without cause. It will be recalled indeed, that the provision existed in its present terms ever since the one-party era. At this time all political activity had to be conducted under the auspices and control of the Chama Cha Mapinduzi, and it could have been argued that this left no room for independent candidates". (p. 41)

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[1] Ibid: 130 - 1. Author's English translation of the original Swahili version.
[2] High Court Civil Case No. 5 of 1993, Dodoma Registry - unreported. Hereinafter referred to as the *Mtikila* case.

The judge did not see any justification of extending the above restriction to the multi-party context. Indeed he found the requirement contradictory of the contents of article 20 (4) which on its part outlaws compulsory recruitment to membership of associations.[1] Furthermore the judge did not see the limitation clause "subject to the procedure provided by or under the law" in article 21 (1), as capable of saving the above requirement. According to him, "while participation through a political party is a procedure, the exercise of the right of participation through a political party only is not a procedure but an issue of substance".[2] Therefore the court ultimately held it lawful for independent candidates, along with candidates sponsored by political parties, to contest in presidential, parliamentary and local council elections.[3]

The government's reaction to the above juddgment expressed its disrespect and breach of judicial independence. The Attorney General not long thereafter withdrew his Notice of Appeal against the same to the Court of Appeal of Tanzania. Then he went on to put before the following Session of the National Assembly, constitutional amendments which effectively were providing for just the contrast of the court's decision.

Thus by virtue of section 4 of the Eleventh Constitutional Amendment Act 1994, article 21 was drastically amended to subject the right so provided to the by then judicially condemned articles 39 and 67. At the same time were inserted thereto even more stringent limitation clauses. The new article 21 (1) reads as follows:

> "21.-(1)Without prejudice to the conditions set in articles 5, 39 and 67 of this Constitution and of the laws of the land relating to the conditions for electing and being elected, or appointing and being appointed to take part in the government of the country, every citizen of the United Republic is entitled to

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[1] Ibid.
[2] Ibid: 42.
[3] Lending support from Lord Diplock's dictum to that effect in *A.G. of Gambia v. Jobe*, L.R.C. (Const.) 556, 565.

> take part in the government of the country either directly or through freely chosen representatives, in accordance with the procedure provided by or under the law".[1]

Simply what was done was the compromising of the fundamental rights as had appeared in the original Bill of Rights, with other provisions of the Constitution and laws inconsistent with the former. The desire of the government to legislatively overrule the court as regards the validity of independent candidates was further expressed when by section 8 of the same Act, a new sub-article was added to article 39 of the Constitution providing:

> "(2) Without interfering with the right and freedom of a person to hold his own opinions, to believe in the religion of his choice, to co-operate with others in public activities in accordance with the laws of the land, no person shall be qualified to be elected to the office of President of the United Republic if he is not a member and contestant sponsored by a political party".[2]

The same was done in respect of article 67 relating to contestants for membership of the National Assembly.[3] This indeed was a mockery of the rule of law, exhibiting the government's determination not to loosen the grip they had always maintained over the conduct of political activities. The issue is whether the mere observance and correct exercise of the power of Parliament to amend the Constitution under article 98, may legitimate the curtailment of the substance and content of the Bill of Rights; particularly where the same does not only change the letter of the concerned provisions, but erodes the ethic of fundamental rights as was done by the Eleventh Constitutional Amendment Act.[4]

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[1] Eleventh Constitutional Amendments Act 1994, Act No. 34 of 1994. Author's English translation of the original *Kiswahili* version.
[2] Ibid. Author's English translation of the original *Kiswahili* version.
[3] Section 13 of ibid. amended sub-article (2) of article 67 by adding thereto a new sub-article (e) providing thus:
"(e) without interfering with the right and freedom of a person to hold his own opinions, to believe in the religion of his choice, to co-operate with others and to participate in the public activities in accordance with the laws of the land, if such person is not a member and contestant sponsored by a political party".
[4] See the *Mtikila* case: 24.

Surprisingly, even retired President Julius Nyerere condemned the government for this move. He described the above amendments as the severe circumscription of the "irksome provision in the Bill of Rights on the basis of which the ban [on private candidates] was ruled unconstitutional by the High Court".[1] According to him:

> "This is very dangerous. Where can we stop? If one section of the Bill of Rights can be amended, what is to stop the whole Bill of Rights being made meaningless by qualifications of, and amendments to, all its provisions? I am saying that the basic Rights of the Citizens of this country must be regarded as *sacrosanct*....The Right to vote and the Right to stand for elective office are Rights of a Citizen. So is the Right to join a Political Party. But using the Right to join a Political Party cannot be a condition for exercising either of the other Rights"[2]

The above criticism of the government from the architect of the system of governance actually sought to be defended by the amendment is sufficient to vitiate of any political legitimacy that night have been there in the government's misuse of Legislative authority. What can be added though is to call upon the courts to cherish the responsibility of guarding against such encroachments upon their constitutional mandate to interpret and apply the law in context. They should respond to Nyerere's concern by making sure that there is an end to such assaults. This is what is meant by judicial activism which we intend to discuss in detail in Chapter Twelve.

10.2..2. The Right to Effective Representation.

It is intended here to look at effective representation in its two major dimensions. The first relates to the issue as to whether the legal reforms made during the *Mageuzi* era have really

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[1] Nyerere, 1995: 9.
[2] Ibid: 10. Emphasis supplied to underscore Nyerere's change of thinking on the status of the Bill of Rights, with time and experience!

reflected a departure in total from the former system under the one-party rule. Secondly is the question whether the same reforms have established institutions of government capable of guaranteeing accountability to the people. Let us begin with the changes effected in the electoral system.

Together with the Eighth Constitutional Amendment Act of 1992, amendments were made to the Elections Act, 1985.[1] The most significant change was the repeal of the former section 4A of the Act which provided for the membership of the National Electoral Commission established by the Constitution.[2] It was replaced by the new section 4 providing thus:

> "4.-(1) The National Electoral Commission shall, subject to the Constitution and this Act, consist of the following members:
>
> (a) a chairman who shall be a judge of the High Court or of the Court of Appeal of Tanzania;
> (b) a vice-chairman;
> (c) a member appointed from amongst the members of the Tanganyika Law Society;
> (d) four other members who are persons possessing either adequate experience in the conduct or supervision of Parliamentary elections or such other qualifications as the President considers necessary for or pre-requisite to the effective discharge of the role of the Commission".[3]

The former law had provided for the Commission's chairman to be a judge of the Court of Appeal only. Moreover the new provision does not provide for the membership of a judge of the High Court of Zanzibar, but instead has a position of the vice-chairman. In order to guarantee the representation of each side of the Union in the two top positions of the Commission, article 74 (2) of the Constitution as amended, provides for the appointment of the vice-chairman in the manner that if the chairman came from one side, the vice-chairman would

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[1]By the Elections (Amendment) Act, 1992, Act No. 6 of 1992.
[2]By article 74 of the Constitution of the United Republic of Tanzania as amended by Act No. 4 of 1992.
[3]This is a re-enactment *in pari materia* of sub-article (1) of article 74 of the Constitution, ibid.

come from the other. And apart from that, sub-section (4) of the same section 4 of the amended Election Act 1985, establishes the position of Secretary to the Commission who is also the Director of Elections.[1]

Another important *Mageuzi* change was the repeal of sections 4B and 4C of the same Elections Act 1985.[2] The first section had, until then, given power to the Commission to try and determine election complaints based on irregularities committed during elections. And the other one established a procedure in relation to the hearing and determination of such complaints.[3]

And specifically related to the demise of the one-party era, sections 41, 42 and 43 of the Elections Act 1985 were repealed.[4] This removed from the statute book the nomination procedure which had hitherto been only possible through and under the auspices of the ruling party, CCM. Similarly a new section 51 replaced the repealed sections 51 and 52 which had provided for the procedure for the organisation and supervision of election campaigns by and under theruling CCM. Under the new provision, only subject to some consultation with the office of the District Commissioner as regards the schedule, campaigns are the concern and responsibility of the candidate, his party and agent. Thus, coming to the question whether these changes have improved effective representation, it is important to critically analyse whether the whole electoral process is capable under the new constitutional set up, of guaranteeing free and

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[1] Position established by section 6 of the Elections Act 1985, as amended by section 7 of the Elections (amendment) Act, 1992, supra.

[2]By sections 5 and 6 of the Elections (Amendment) Act 1992, respectively.

[3]The procedure was in fact introduced only in 1990 by Act No. 13 of 1990, allegedly to deal with the problems of delay, costs and unnecessarily complicated procedure of election petitions in the High Court of Tanzania. But after having applied after only one General Elections, there were so many complaints against the Commission, in particular the lack of observance of the rule of law and natural law principles in the whole process, and as a result the Nyalali Commission recommended against the same. (Para 596, Book One, p. 142). And thus the re-transfer of the hearing of election petitions to ordinary courts was directed by the Party Guidelines of 1992, and hence the amendments in section 108 of the Elections Act 1985, by section 49 of Act No. 6 of 1992.

[4]By sections 16, 17 and 18 of Act No. 6 of 1992, respectively.

fair elections. Therefore the evaluation of the independence of the National Electoral Commission cannot be avoided.

10.3. The Independence of the National Electoral Commission.

Right through the *Mageuzi* process, there has invariably been voiced, mainly from academic circles and the opposition, reservations as regards the independence of the present National Electoral Commission. Indeed it was part of the recommendations of the Nyalali Commission that:

> "Chairmen of Electoral Commissions together with the ordinary members thereof be appointed by the National Assembly/House of Representatives as applicable, but not from among the members of the Houses. The Directors of Elections who shall also be Secretaries of the Electoral Commissions, be appointed by the National Assembly/House of Representatives on the basis of the recommendations of the respective Civil Service Commissions. It is also advised that Electoral Commissions also be independent organs in the conduct of their business without the offices of the National Assembly/House of Representatives...."[1]

The above recommendations were only partly implemented by the government, in that at least at the level of law, the independence requirement in the Commission's conduct of business is fulfilled. It is provided in the new article 74 (7) of the Constitution thus:

> "(7) For the purpose of the best performance of its functions, the Electoral Commission shall be an independent department, and its principal executive shall be the Director of Elections who will be appointed to work in accordance with conditions set out in the law made by Parliament".[2]

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[1] NCR, 1991: 141, para. 593.. Author's English translation of the original *Kiswahili* version.
[2] Author's English translation of the original *Kiswahili* version.

Moreover it is expressly stipulated in the same article (art. 74 (11)), that in the due exercise of its authority, the Electoral Commission shall not be bound by or follow any order or instructions of any person or department of the government, or any opinion of any political party. Instead it is directed by the Constitution[1] that its decisions may be made even by only part of its membership, but that the same must be supported by the majority of the total number of its members.

Apparently it was for the purposes of underscoring the importance of the Commission's independence that a specific category of persons were excluded by the Constitution from eligibility to its membership. These include ministers and deputy-ministers, other persons so restricted by the law, Members of Parliament or similar persons, and people in the leadership of political parties (art. 74 (3)). Moreover within the membership of the Commission, as it has been shown above, were included a judge as chairman and a member of the Tanganyika Law Society. This is a genre of persons who by virtue of their office or profession were expected to be independent of government control. Yet it is on the aspect of the way the Commission's membership is constituted which is the main subject of controversy. One questions the capacity of their independence when they continue to be appointed by the President, in total disregard of the recommendation of the Nyalali Commission. Undoubtedly what is lacking is the trust of the people in the Commission so appointed. Whether that is true or not is not the matter at issue. But as Justice Mwalusanya has put it, the Electoral Commission should be "independent beyond reproach like Caesar's wife, so that justice is not only done but seen to be done, as the maxim goes".[2]

Thus the opposition political parties have condemned as unfair all elections conducted and supervised by the present Electoral Commission. They have charged that the Commission

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[1] Article 74 (9) of the Constitution as amended by Act No. 4 of 1992.
[2] Mwalusanya, 1994: 27 - 28.

cannot be free, fair and independent of government control when it is financially dependent on the latter, and that the interests of the opposition are not represented within its membership. Nevertheless the parties in the opposition have not been consistent on this issue. At the beginning of the practice of multi-party politics in early 1993, they tended to put the creation of a truly independent electoral commission as a condition precedent to their taking part in the October 1995 General Elections. [1] Indeed they even attempted some judicial solutions. In *Mabere Nyaucho Marando and Another v. The Attorney General*[2] for example, the plaintiffs were challenging the political legitimacy of the National Electoral Commission in its present form. Apart from the arguments mentioned above, they underscored on the political affiliation of the members of the Commission because of the way they had been appointed. But although the witnesses in the case had attempted to provide instances of the Commission's lack of independence to their disadvantage, the court found it as a point of fact that they had failed to show how the Commission had by reason of its composition negatively influenced elections which it had supervised.[3]

And also the court dismissed the plaintiff's arguments that by using the CCM government's employees as officers of the Commission, it was CCM which had been controlling and supervising the elections in which it was also a contestant, against the rules of natural justice. The judge was not convinced that the above reasons alone vitiated the Commission's independence. Thus, relying on the interpretation of a similar situation by the European Court of Human Rights in the case of *Campbell and Fell v. United Kingdom*,[4] the judge concluded:

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[1]See in Mwalusanya, 1994.
[2] High Court Civil Case No. 168 of 1993, Dar Es Salaam Registry - unreported. Hereinafter referred to as the *Marando* case.
[3]P. 27 of the copy of the judgment.
[4]7E H.R.R. 165.

> "I therefore do not subscribe to the plaintiffs' contention that whoever is a member of the Commission is biased against opposition parties....the personal impartiality of the members of the National Electoral Commission is presumed until the contrary is proved. No evidence has been adduced to prove the contrary".[1]

The court therefore advised the plaintiffs either to include their reservations on the Commission's independence in their election manifestos; or in the alternative look for lawful means to pressurise the government to institute procedures for the amendment of the Constitution. It is not clear exactly which alternative of the two the opposition parties preferred, but when the political wind seemed to blow in their direction with the defection of some prominent members of the ruling party to some of them,[2] they decided to fight the October 1995 General Elections under the same Commission. However after the election results seemed to reveal their imminent defeat against the tide of expectations following a relatively successful campaign period, the same parties were back at the Commission's neck. But this time it was in a joint action in the High Court accusing the latter of its responsibility in the partnership of the ruling party CCM, of the general rigging of the elections. They thus prayed that the results of the general elections be nullified, and instead a transitional government led by the Chief Justice be installed in power. Also that CCM and their presidential contestant Benjamin Mkapa, be banned from political activity for a period of five years for their part in the election irregularities.[3]

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[1]P. 28 of copy of judgment.

[2]The populist former Deputy Prime Minister and Minister of Home Affairs, Augustine Lyatonga Mrema, very dramatically defected from CCM to the NCCR-Mageuzi, after being fired as Minister of Labour and Social Welfare, to which he had only a few months earlier been demoted, for lack of discipline and breach of the principle of collective governmental responsibility. This all of a sudden, turned the latter party's political fortunes on account of the defector's well known uncompromising anti-corruption crusade which increased its popularity, making it the most formidable opposition party to CCM. Mrema was immediately thereafter made Chairman of the NCCR - Mageuzi and its contestant for the Presidency.

*[3] See IPS, 1995.

These accusations were, denied by the Commission, both in court and outside, emphasising on its constitutional mandate and independence from any influence.[1] However, whatever decision the court made[2] does not matter to the point we intend to make here. The mere inconsistency of the positions of opposition parties in this regard, only unveils their opportunistic approaches to politics, very prejudicial to the whole democratisation process. This weakens their case against the Commission. But on the other hand, the Commission in their defence can only establish its *de jure* independence, undoubtedly leaving unanswered the question whether it commands the trust of all the voters irrespective of political affiliations. The issue is whether it is *de facto* independent beyond reproach. Indeed to this extent neither the Commission itself nor the government can convincingly justify the failure to comply with the recommendation of the Nyalali Commission as to the appointing authority, the omission which engenders the mistrust illustrated above. This leads us to the other aspect of effective representation, the establishment of the institutions of public accountability.

10.4. The Establishment of Institutions of Public Accountability.

Multi-party politics and elections in themselves are worthless if the same do not go along with the establishment of a system of institutions of public accountability. If there is anything positive lacking in the *Mageuzi* constitutional reforms, it has been the failure to make effective changes in the centralised and generally unaccountable Presidential system which has operated in Tanzania for over three decades. It is surprising that lessons have not been learnt from next door neighbours Zambia and Kenya, where multi-party elections only led to new

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[1] Refer to the Official Statement of the National Electoral Commission in RTD, 1995.

*[2]The Court has ultimately dismissed the main claims of the petitioners as set out above. See VOA, 1995. See also copy of judgment

regimes within the former and generally unchanged state systems. The result was the continuance of undemocratic politics and draconian governance.[1]

In Tanzania the omnipotent Imperial Presidency institution remains basically unchanged with only superficial reforms effected as we attempt to illustrate below. The President is still the Head of state and government (art. 33 (2)), vested with all executive powers of state in respect of the United Republic and Tanzania Mainland (art. 34 (3)). All executive action are is taken on behalf of him (art. 35 (1)). Moreover he still retains the power to create and abolish all public offices (art. 36 (1)), with the ultimate discretion as to the appointment, dismissal and discipline of public servants.[2] And he is not bound to take or follow any advice from any person or body (art. 37 (1)).

However most relevant to this discussion, is the fact that not much has been made by the *Mageuzi* reforms to make the President accountable to Parliament. Neither have there been any attempts to rid the law of the uncertainty as to whom, between the National Assembly and the President, the government of the day under the Prime Minister is in real terms accountable. The President has retained his superficial relationship with the National Assembly, which still serves to illustrate his ability to supersede if need be, the general will of the representatives of the people. First it is through the law making function of Parliament wherein he has the power to veto Bills passed by the National Assembly. He may also dissolve Parliament in the occasion of the passing by the latter of the same Bill by a two thirds majority within a period of six months.[3] As the law does not require the giving of reasons for the refusal to grant presidential assent to a

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*[1]For the human rights and democracy positions of these countries after the holding of multi-party elections see Kaballo, 1995, relying in respect of Zambia, on HRW, 1994a., and in the case of Kenya, HRW, 1994, and CS, 1993. Note the most recent bloody demonstrations for a new Constitution in Kenya. See DN, 1997.

[2]Article 36 (2) ; although it has already been held by the High Court in the case of *James F. Chagilo v. Attorney General* [Mwalusanya J.], Civil Case No. 23 of 1993, Dodoma Registry - unreported, that the President of the United Republic of Tanzania does not now enjoy the prerogative of dismissal of public servants at will.

[3]See article 97 (4) of the Constitution.

Bill and possible dissolution of Parliament, the position remains precarious it could easily be abused by the President of a different party against the National Assembly commanded by a majority of members from another party.[1]

10.4.1. The Procedure for the Empeachment of the President.

The new reforms have not brought control powers over the President by the National Assembly merely by providing for the procedure for his impeachment.[2] There are a number of limitations as to the employment of this power. First it is the fact that it stands without prejudice to the President's protection against ordinary legal proceedings under article 46 of the Constitution. Thus it is limited only to, "acts of the general breach of the Constitution or national ethics mentioned in article 20 (2) of the Constitution[3] or conduct demeaning of the Presidency of the United Republic" (art. 46). This is an ambiguous criterion, which is limited in scope. Secondly, a stringent procedure has been provided, including the requirement for the presentation, to the Speaker of the National Assembly, of a written motion supported by a third of all the members of the Assembly. This should be done thirty days prior to its being tabled before the Assembly. The motion is supposed to propose for the institution, by the Speaker, of a Committee of Inquiry into the President's conduct for the purposes of recommending, to the House, for his impeachment (art. 46A (3) (a)). If the speaker satisfies himself as to the required

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[1]Under the present constitutional set up which is a mixture of the American presidential and British parliamentary systems, it is very possible to have different parties holding the presidency and the majority in the National Assembly at the same time. Unfortunately the impasse like which engulfed US Democratic Party President Bill Clinton on the one hand, and the Republican Party-dominated Congress over the Balanced Budget / Government Shut Down issue during the week beginning 13 November 1995, cannot be desirable in the context of the volatile politics of young nations like Tanzania. For more details on the American problem see SO, 1995.

[2]Article 46A (1) of the Constitution as amended by section 7 of the Ninth Constitutional Amendments Act, 1993.

[3]Including the advocacy of the causes based on religious beliefs, ethnic, tribal, race and gender discrimination, and promoting the disintegration of the Union of Tanzania, all of which are discussed in detail above in the next chapter.

support for the motion, he has to present it before the House for voting without debate, the passing of which demands a two thirds majority support of all members (art. 46A (3) (b)).

It is only then that the Speaker will form the Committee of Inquiry comprising the Union Chief Justice, Chief Justice of Zanzibar, one judge from a country member of the Commonwealth, and other two retired judges to be appointed by the Speaker (art. 46A (4)). The said Committee's proceedings must be commenced within seven days of its formation (art. 46A (3) (d)). The same must include the hearing of the accused President's defence (art. 46A (3) (e)). Any recommendations against the President can only have effect if they are accepted by a two thirds majority of the total of the members of the National Assembly from each side of the United Republic. It is then that the President will have to resign within* the passing of the House's motion to that effect (art. 46A (5)). It should also be noted that such motion cannot be made within twelve months following a similar motion previously submitted to and rejected by the National Assembly (art. 46A (2)). Undoubtedly under the above complicated procedure, the chances of the removal of an unwanted President may only be possible in the present multi-party system, by the will of the party which commands a two thirds majority from all sides of the Union, an unlikely event, in Zanzibar in particular.[1]

10.4.2. The Accountability of the Government to the National Assembly.

It seems that following some recent constitutional amendments the government has been made more accountable to the National Assembly at least in theory. Now the Prime Minister, although still appointed by the President, is supposed to come from, " a party with the majority of members in the National Assembly or who is likely to command the support of the members

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[1]The history of multi-party elections in Zanzibar has always been an almost fifty-fifty division based on historical socio-political conflicts in the Islands which cannot form part of this thesis. For example in the recent October 1995 general elections the winning President Salmin Amour from the ruling party CCM has scooped a thin just over 50 per cent majority, itself still the subject of controversy.

of the National Assembly,...who shall assume the said responsibilities by a motion supported by the majority of the members of the National Assembly" (art. 51 (2) (1)). The issue is whether this provision compels the Prime Minister's accountability to the National Assembly, to a larger extent than that he is supposed to accord to the President. The answer should be in the negative. The above appointment procedure notwithstanding, the latter retains the power to dismiss the Prime Minister without any consultation with the National Assembly.

Besides that, article 53 (1) of the Constitution which remains unchanged, expressly compels the Prime Minister to be answerable to the President in the performance of the functions of his office. The same applies to Ministers and Deputy Ministers appointed by the President (art. 55 (2) (1)) from amongst members of the National Assembly (art. 55 (4)), who have to take an oath of allegiance to the President in respect of the discharge of their duties (art. 56). Indeed the confusion mentioned above is brought about by the express provision, since 1984, of the collective responsibility of Ministers, under the Prime Minister, before the National Assembly, "for the discharge of the functions of the government of the United Republic" (art. 53 (2)). It can only be stated here that the overall significance of this provision will remain limited in the presence of the provisions of the Constitution mentioned above commanding the parallel and seemingly primary accountability of the government to the President. We have shown above that the President is not accountable to the people through their representatives in the National Assembly.

10.4.3. The Vote of No Confidence Against the Government.

The status of the National Assembly has neither been improved merely by the provision of the House's power to pass a motion of no confidence in the Prime Minister and therefore his

government.[1] Again, like the impeachment of the President, the procedure involved here is subjected to a number of hurdles not simple to surmount. Firstly, such motion may not stand if it does not relate to the Prime Minister's day to day executive functions and leadership of government business in the National Assembly (art 52). The same may at a preliminary stage fail if the Prime Minister has not been in office for more than six months, and if so, in case nine months has not elapsed since the defeat in the House of a similar previous motion (art. 53A (2)). Other conditions under article 52 (2), although less difficult than those relating to the impeachment procedure, ultimately require the support for the motion of the majority of members of the National Assembly. This signifies that it is only a party with an absolute majority in the House which can successfully pursue this motion. Ironically such party would be the one having the Prime Minister and the government in power.

In the final analysis, one does not see the people as are represented in the National Assembly, coming out of the *Mageuzi* reforms, more well off than they hitherto were. Although the National Assembly is no longer a Committee of the National Congress of the ruling party CCM as it used to be,[2] and that a motion of the National Assembly can no longer be repudiated by any political party as was done by the ruling party in respect of the Tanganyika Motion as late as 1993,[3] still there is a lot to be desired in the direction of liberating parliamentary democracy in Tanzania from the constitutional constraints discussed above.

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[1]Article 53A of the Constitution as amended by section 9 of the Ninth Constitutional Amendments Act, 1992.

[2]Article 63 (4) of ibid. which provided for the same was repealed by section 17 (b) of Act No. 4 of 1992.

[3] In 1993 following the OIC saga and other breaches of the Constitution on the part of the Revolutionary Government of Zanzibar, there was some heated debate during the Budget Session of the National Assembly to the effect of questioning the justification of continuing with the present form of the United Republic, and this lead to the Motion on the formation of the Tanganyika Government wihin a federal Union of Tanzania. The same was subsequently thereafter in a CCM NEC Sitting vehemently objected to by the former President but still influential Julius Nyerere, who claimed that the Motion was bound to wreck not only the Union, but also the Tanganyika and Zanzibar nations themselves. This view later on prevailed in the House which was forced to rectify the earlier Motion to express the desire of the establishment of a single-government union, which everyone knows is near to impossible owing to Zanzibar's genuine claims of more sovereignty even under the present set up. See EXP, 1993.

10.4.4. The Constitutional Conference Controversy.

It is on account of the above that there has been a cry for a Constitutional Conference as a minimum condition for the functioning of a democratic constitution. It is argued that without it there can be no crystallisation of a national consensu, necessary for the enjoining, within the Constitution to result therefrom, of some form of political legitimacy.[1] These have always been key demands of at least three political parties in the opposition,[2] who have always contended that each person and each group needed to be satisfied that their interests were guarded by their Constitution.[3] Surprisingly in spite of the above reservations, these parties went on to participate in the October 1995 General Elections under more or less the same constitutional regime. It was only one party, the Democratic Party of Rev Christopher Mtikila, who refused to tow the line of operating under the constitutional principles they were basically opposed to, thus even failing to meet the conditions for full registration to be discussed in the next chapter.

Undoubtedly the demand for a Constitutional Conference or even a referendum goes along with the requirements of article 21 (2) of the Constitution as regards the right of all citizens to be consulted in respect of national decisions on matters which affect them. It had never been within the political culture of the one-party regime in Tanzania to opt for referenda whenever there was need to consult the people at instances of the making of major decisions.

There has also been unsuccessful attempts to use the courts to force the government to concede to the holding of a Constitutional Conference. For example in the *Marando* case the High Court held that a constitutional conference was a remedy which could be sought and

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[1] See Mvungi, 1993: 23.
[2] CHADEMA lead by Edwin Mtei, NCCR-Mageuzi then under the leadership of Mabere Marando and N.L.D. of Emmanuel Makaidi.
[3] See also the Recommendations of the Seminar on the Constitutional Reforms For Democratisation in Tanzania held at the British Council Conference Hall, Dar Es Salaam, from 27 - 28 November, 1992, reproduced in Fimbo and Mvungi, 1993: iv, note 91.

obtained through Parliament.[1] Indeed the same position was repeated by the court in the *Mtikila* case, it being categorically stated that, while it conceded unequivocally that every citizen is entitled to participate in the making of decisions on matters affecting their country, the only mode of participation now available is election of representatives to the National Assembly. Thus seemingly the present position on this issue is in the form of a vicious circle. It begins with the mistrust of the National Electoral Commission by the members of the opposition parties whose demands for Constitutional Conference to resolve the issue of the making of a politically legitimate Constitution has been turned down by the Courts, the latter directing the former to the ballot box, which again is under the control and supervision of the Electoral Commission complained of in the first place. Indeed these are some of the constitutional problems whose ultimate solutions will definitely unfold with the further continuation of the marriage in the Tanzanian context, of the human rights and political discourses.

10.5 Conclusion.

This chapter dealt with testing the extent to which the *Mageuzi* process affected the institutions of public accountability in Tanzania. It is apparent from the constitutional reforms adumbrated above that not much has been done to change the present constitutional set up to make the government really accountable to popular institutions. Saying that does not imply that government accountability is an easily achievable ideal. The contrary has recently been verified in the United Kingdom by the Scott Report.[2]

There are at leat two things Tanzania could learn from the above report. The first is the extent to which government secrecy can vitiate the values of government accountability. The report holds that "failure by Ministers to meet the obligation of ministrerial accountability by

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[1] Also the *Mhozya* case.
[2] Scott, 1996.

providing information about the activities of their departments undermines democratic process".[1] The above should be demanded by democratic forces in Tanzania, against the oft-excessively applied government secrecy norm.

The second aspect relates to the responsibility of ministers for the misdeeds of their departments even without their knowledge. The Scott Report has applied a dubious distinction between "ministerial accountability" and "ministerial responsibility". It is argued that ministers should not be blamed or accept personal criticism unless there were personally involved in some way.[2] In Tanzania there is precedent of ministers stepping down for actions done by their departments without their involvement.[3] It is insisted that this practice should be encouraged to grow into a culture. The Scott Report's justification of the present complexity of government business does not presently apply to Tanzania. The resignation threat in all circumstances is still needed for the growth of democratic institutions in the country.[4]

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[1] Ibid: 1800, para K 8.3.
[2] Ibid: 1805 -6, para K 8. 15. See some recent critical analysis of the Scott Report in Lewis and Longley, 1996.
[3] Former President Ali hassan Mwinyi in the 1970s resigned as Minister for Home Affairs after descovery of inhuman torture in the lake region in the hands of security forces. The same was done later by Said Natepe from the same ministry after the escape of suspects of treason charges from remand prison.

CHAPTER ELEVEN

Freedom Of Association And Democratisation 1992-1994

11.0 Introduction

In the past Chapter the background to the transition from one-party to multi-party rule in Tanzania was discussed. This Chapter sets out to continue exploring how the changes we referred to as *Mageuzi* affected freedom of political association and assembly. It is argued that the way that these rights were articulated in the political discourse involved had a lot to do with the level of commitment by the government to change itself. Let us first examine the scope of these rights in the Bill of Rights.

11.1 The Scope of the Rights Provided in the Bill of Rights

The sister rights of association and free assembly which usually co-exist in bills of rights, are basically among the most fundamental civil and political rights. They form part and parcel of the traditional human rights discourse, which is predominantly liberal-democratic. Moreover the same have been part and parcel of the civil and political rights as are enshrined in the relevant United Nations instruments and many written constitutions of the world.

The general right to freedom of association is set out in article 20(1) of the Constitution in the following terms:

> "subject to the laws of the land, every person is entitled to freedom of peaceful assembly, association and public expression, that is to say, the right to assemble freely and peaceably, to associate with other persons and, in particular to form and belong to organisations or associations formed for the purposes of protecting or furthering his or any other interest"[1]

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1 The Constitution of the United Republic of Tanzania, 1977.

In terms of content, the above-quoted provision does not differ with what is comprised in articles 21 and 22 of the International Covenant on Civil and Political Rights of 1966. Both provide for the right to the freedoms of peaceful assembly and association, although the international instrument has done that in two separate articles. However there is a difference of emphasis in respect of the freedom of association. The above-cited provision of the Tanzania Bill of Rights has insisted on the right to public expression while the Covenant underscores the individual's right "to form and join trade unions". Actually the Bill of Rights provision just stops at the right "to form and belong to organisations or associations formed for the purposes of protecting or furthering his or any other interests". It is indeed no accident that the phrase 'trade unions' is absent from the Tanzanian provision, having already discussed the ruling regime's scepticism against autonomous mass organisations in Chapter Eight.[1]

The influence of the African Charter in this regard is noticeable. The Charter is also silent about the right to belong to and form trade unions. Another similarity of the Bill of Rights to the Charter and the Covenant relates to the way the right to peaceful assembly and association have been subjected to the laws of the land. But the Bill of Rights does not specify which type of laws. This is well done by the Covenant, particularly in respect of the right to peaceful assembly, it specifically limits the restrictions thereof to "conformity with the law and which are necessary in a democratic society in the interests of national security and public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." (art.21) Certainly subject to the general limitation clause enshrined in article 30 of the Constitution, the inclusion of the above-cited provision within the ambit of article 20, would have provided viable guidelines for interpretation in specific cases, as to which laws are capable of restricting the enjoyment of

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1 Also supra, Chapter Nine.

the right to peaceful assembly and association. How the courts in Tanzania have interpreted limitation clauses in general has already been analysed in Chapter Nine.

11.2 The Eighth Constitutional Amendment and Freedom of Political Association

Section 5 of the Eighth Constitutional Amendments Act 1992 abolished the one-party system amending article 3(1) of the Constitution to read "The United Republic is a democratic and socialist state adhering to a multi-party political system."[1] Also it repealed the provisions which had provided for party-supremacy (art 3(2) and (3) and Art.10). Then authority was given to Parliament to legislate for the new political scenario.

Hence the Political Parties Act 1992 came into existence.[2] This law set out some legal procedures for the establishment, registration and conduct of activities of political parties, in accordance with the direction previously issued by the ruling party CCM.[3] The substance of the above Act was grounded in the re-enacted article 20(2)[4] of the Constitution which hitherto had only prohibited compulsory enrolment of the membership of any association.[5] The new provision specifically sets out the conditions for the registration of political parties, thus:

> "(2) Without prejudice to sub-article (1) no political organ shall qualify for registration if by its constitution or policy -
>
> (a) it aims to advocate or further the interests of -
>
> (i) any religious belief or group;

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1 Author's English translation of the original *Kiswahili* version.

2 Act No.5 of 1992.

3 See Speech of Hon. Edward Lowassa, Minister of State in the Prime Minister's Office and First Vice-President to the National Assembly during the first Reading of the Bill thereof on 7th May 1992, in Hansard, 1992:682.

4 A Bill of Rights Provision.

5 Which was never respected by CCM and her government. For example all members of the armed forces including the Police and the Department of National Security, were compelled to be CCM members. From his own account, Mabere Nyaucho Marando, the founder and present Secretary General of the NCCR-Mageuzi party, was expelled from the employment of the Department of National Security for refusing to unwillingly join CCM. Likewise, from 1975 until very recently following the 1974 Musoma Resolution of the NEC of TANU (Tanganyika African Union, that is CCM's predecessor in Tanzania Mainland), the recommendations of a local branch of TANU and after 1977 CCM, were made compulsory for a Tanzanian's admission to any institute of higher education, thus compelling potential applicants to join the party.

(ii) any tribal, ethnic or racial group; or
(iii) only a specific area within any part of the United Republic;

(b) it advocates the breaking up of the union constituting the United Republic;

(c) it accepts or advocates the use of force or violence as a means of attaining its political objectives;

(d) it advocates or aims to carry on its political activities exclusively in one part of the United Republic; or

(e) it does not allow periodic and democratic election of its leadership".

The above mentioned provisions are reproduced in section 9(2) of the Political Parties Act 1992.[1] One notes that even at their face value these conditions are stringent. They form one reason why it was decided against subjecting the registration of the new political parties to the procedure that already existed under the Societies Ordinance.[2] The stiff conditions for political parties cannot be applied to ordinary societies which are the main concern of the latter law.[3] This invites some question as to whether the mere repudiation of articles 3 and 10 has in itself brought any improvements in the enjoyment of freedom of association. This we attempt to answer in the following sections. But before that, it behoves us at this juncture to unveil an obvious contradiction within the provisions of the new article 20 itself. The same relates to sub-article (4) thereof which has replaced the former sub-article (2), by providing thus:

> "(4) Without prejudice to the relevant laws of the land, a person shall not be compelled to belong to any association or corporation, and no party, be it

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1 The new sub-article (3) of article 20 of the Constitution empowers Parliament to enact a law setting out conditions for ensuring that political parties conform with the restrictions and criteria set out in sub-article (2) of the same article.

2 Cap.337 of the RLT, 1965.

3 It should be noted that during the colonial era and after independence but before the imposition of the single-party political system in 1965, political parties were governed by the same Societies Ordinance. Yet the other reason given by the Minister in the speech referred to above, for departing from the above Ordinance in preference of a separate Act of Parliament, was the fact that the Ordinance applied to Tanzania Mainland only, while in fact CCM had already directed that the question of political parties should be a Union matter. See Hansard, 1992:682-3. See also s.2 of the Political Parties Act 1992, applying the same to both Tanzania Mainland and Zanzibar.

> political or otherwise, shall be refused registration only on ideological and philosophical grounds."[1]

The problem here is how one can mitigate the apparent contradiction between the above provision on the one hand, and the content of sub-clause (i) and (iii) of clause (a) of sub-article (2), or even clause (b) of the same sub-article quoted previously, on the other hand. The latter have a lot to do with a potential party's ideological as well as philosophical orientation, which could be forming the very basis of its existence. Whether this contradiction surfaced during the *Mageuzi* period in respect of the registration of the new parties is the concern of our discussion in the section below.

The intention of Parliament in imposing the said conditions was clearly stated in the National Assembly by Hon. Edward Lowassa, the then Minister of State in the Prime Minister and First-Vice President's Office, when introducing the Bill for the Political Parties Act 1992, as being:

> "...to make political parties to be national institutions which are not tribal, religious, and organs only aimed at advocating and furthering ethnic and particular group or racial interests. Otherwise these conditions are also aimed at the safeguarding of the Union and democracy within the parties themselves, and also peace and tranquillity in the conduct of political activities."[2]

The same had been underscored earlier by Hon. John Malecela who had said that the real intention of the government was to "... ensure that *Mageuzi* in the country were co-ordinated in such a way that they met the desired aims without any disturbances, and indeed not only theoretical changes which have no benefits to our country."[3] Thus the main task of the discussion below will be to strike a balance between the above aims of the government on

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1 Author's English translation of the original *Kiswahili* version, and emphasis supplied.

2 Hansard, 1992:684-5. Author's English translation of the original *Kiswahili* version.

3 Ibid: 127. Author's English translation of the original *Kiswahili* version. See also the Recommendation of the Nyalali Commission to the effect that the changes should immediately be effected to avoid breach of peace. See Recommendation XXVII in the NCR, 1991:7.

the one hand, and the constitutional demands of the right to freedom of association on the other hand.

Let us first give a brief but closer look at the conditions themselves. One cannot by any means deny the sensitivity of the religious issue, and the threat that the same has always posed to the customary peace and tranquility in Tanzania. The latter has been the base of all decisions made by the ruling party CCM and its government during the *Mageuzi* period. With a religious proportion of the population percentage of 45 Christian, 35 Muslim and 20 traditional beliefs,[1] the spectre of religious turmoil has continually been haunting the Tanzanian political discourse ever since the early days of independence. We indicated in Chapter Eight how the post-independence government crushed grassroots-based organisations. This included the All Muslim National Union of Tanganyika (AMNUT).[2] But that did not mean the total silencing of the Islamic interest groups as recent developments have shown.[3]

During the presidential tenure of a Muslim President Ali Hassan Mwinyi, there emerged a significant number of Islamic non-state mass organisations. Their activities were not only limited to preaching the Islamic faith or even criticise that of the Christian. They were also demanding of the government to accord Moslems with some form of positive discrimination against Christians, in respect of social services, notably education

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1 See *Tanzania Information*, in the CIA Server, op.cit. The religious issue is so sensitive that the major statistical data sources in the country, i.e. *The United Republic of Tanzania Statistical Abstract: 1992*, and the *TANZANIA Sensa 1988*, do not comprise any information about this religious division in the country, which is a very serious omission indeed!

2 Mwekyembe, 1985:37-38.

3 The same demands as had been advocated by the defunct AMNUT were indeed in effect being pursued by the late Prof. Kighoma Ali Malima in the short spell he occupied the position of Minister of National Education, and according to reliable government sources, the same was the cause for his removal therefrom following the CCM NEC's pressure. When the same Minister in August 1995 left CCM upon failing to be nominated as the ruling party's Presidential candidate and joining the less known party, the National Reconstruction Alliance (NRA) for the same purpose, he made it clear that his policies included fighting for affirmative action in favour of Tanzanian moslems. The same was being heard of the latest candidate to join the Presidential race under the auspices of the CUF party Prof. Nguyuru Harun Lipumba.

opportunities.[1] The same did eventually lead to a sensitive constitutional conflict within Parliament during the 1993/94 Budget Session.[2] Not only that, but on Good Friday of 1993, in an unprecedented fashion, a huge group of allegedly Muslim followers attacked a substantial number of pork shops and butcheries in a certain locality of the city of Dar es Salaam, causing serious social chaos and substantial damage to property.[3]

The point underscored here is that the use of coercion or law by the state to silence some religious organisations does not necessarily work towards the safeguarding of peace, unity and tranquillity. Instead of postponing the social turmoil from future religious conflicts, a more effective solution seems to be the legitimisation of political organisations based on some form of religious ideologies or philosophies. This could cultivate a culture of restraint, for the ultimate guarantee of permanent peace and tranquillity. The present set up of article 20 cannot achieve the above ends. Therefore the apparent conflict inherent within the provisions of article 20 as is elucidated above, should be resolved in favour of sub-article (4). But it should be added that no political party may be refused registration only on account of its religious ideology or philosophy to advocate and further violent means in the procurement of its political ambitions.

Definitely, within the context of multi-party politics, freedom of association should be understood and practised in the pluralistics sense, that is the freedom of all interest groups to the lowest and most minute levels. It is only in that way that the nation as a whole could benefit from the contributions made by the various initiatives from the grassroots level, not

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1 There is no direct evidence of former President Mwinyi's support of such fundamentalist agenda. But there was strong rumour circulating to that effect at least within the city of Dar es Salaam. But the Cabinet by 31 December 1992, had 10 Muslim Ministers out of the total number of 25 excluding the President of Zanzibar. See BOS, 994:16.

2 This involved the unilateral accession by the Revolutionary Government of Zanzibar to the Organisation of Islamic States which accepts only Sovereign States. This caused protracted debates in the National Assembly, which revealed apart from some Tanzania Mainland anti-Union sentiments, also the Christian/Moslem often hidden rivalry. The government itself had earlier through the Minister of Justice and Constitutional Affairs conceded to the unconstitutionality of the said OIC application by Zanzibar, See DN, 1993.

3 Stern measures were undertaken by the government including unilateral large-scale arrests and incarcerations, a few of which were subsequently prosecuted.

only politically, but culturally and economically as well. Indeed it is from this omission among others, obviously engendering the centralised state control of every aspect of life in Tanzania, that the country was condemned to total economic failure.

Coming to the disqualification of potential parties for advocating ethnic, tribal, racial and gender programmes, one wonders on what basis this law has grouped the above under the same category. While there may be some relationship between ethnicity and tribalism, the two do not necessarily follow one after the other. Besides that one does not see how racism and gender should be associated with the other categories mentioned in article 20(2) of the Constitution. Apparently the disqualification of potential parties on the grounds related to the above-mentioned categories is a result of CCM and its government's ostensible commitment to "national unity" at any cost. The same has brought forth another wrong assumption that Tanzania is, and has always been, a unified nation without any substantial regional differentiation.

However it is important to specifically take note of the obvious regional division of the country. It has roots-going as far back as the German colonialists' demarcation of the territory between the soil-rich highlands favourable for European settlement, plantations and cash crop growing areas on the one hand, and the labour reservoir areas on the other hand.[1] The country's development has taken the same pattern ever since, as is illustrated by Table 11.1 below.

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1 Supra, Chapter Six.

TABLE 11.1 Some Development indicators in Selected Regions of Tanzania Mainland

Region	Population 1988 Census	1985 Under 5 Infant Mortality Rate per 1,000	Supply of Tap Water in Rural Households	Supply of Electricity in Rural Households	1991 Local Government Recurrent Revenue in Mill. Tshs.	1990 Total Gross Output in Manu-facturing Industry in Mill T.shs.
Tanzania Mainland	23126952	191	19745	30866	215582.80	144318.4
Arusha	135175	119	18149	3040	1694.31	14867
Iringa	1208914	220	34366	1766	1321.21	9864.9
Kagera	1326183	219	3449	908	1517.54	798.0
Kilimanjaro	1108699	104	27913	7158	1675.83	7435.8
Tanga	1283636	176	9448	3060	1383.73	119911.5
Mtwara	889494	233	17990	885	896.12	577.4
Tabora	1036293	166	1410	1052	1205.89	586.1
Rukwa	694974	221	295	581	743.82	11.0
Kigoma	854817	192	11857	866	996.01	70.0
Lindi	646550	236	6121	466	671.43	105.5

SOURCE: Extracted from BOS, 1992. Tables C.3 on p.20, C 14 on p.32, C 16 on p.34, and H32 on p.126, and also from BOS, 1988:21, Table 1.

In Table 11.1 above, we attempt to provide a comparative picture between five regions which during the colonial period, either were plantation/cash crop growing areas or both, that is Arusha, Iringa, Kagera, Kilimanjaro and Tanga on the one hand, and, on the other hand, the former labour reserve regions of Mtwara, Tabora, Kigoma and Lindi, in respect of some basic indicators of rural development. It should be emphasised at the outset that these figures only give an impression of the situation to support our argument, and they do not give the most precise statistical analysis. Generally the figures are an illustration of a development gap between those two groups of regions, which is invariably obscured by claims of a unified non-sectarian Nation often made from political platforms. By looking at the above table, a stranger could easily think he was reading information from two different countries.

Let us then begin with the figures for infant mortality before the age of five, which serve to show the level of health facilities in the selected regions. Whereas the same do not generally reveal a very wide gap, but comparing Lindi Region which has the highest number

of 236 with 104 being the lowest number for Kilimanjaro, one sees the difference. The former is 23.6 per cent above the national rate of 191, while the latter is 45.5 per cent below, placing the two regions miles apart. However it is the figures for the supply of tap water and electricity in rural households which show the real distinction. Save for Kagera in the first group, which falls behind even Mtwara and Kigoma in the other, as a whole it is the latter group which is far behind that whereas Iringa's 34366 units amount to 17.4 per cent of the national rate of 197415, Rukwa's 295 are a mere 0.1 per cent. And as for the available electricity supply, Kilimanjaro has the highest rate with 7158 units which is 23.1 per cent of the national rate of 30866, compared with Lindi's 466, which is only 1.5 per cent thereof.

However, it is the figures for the gross output of manufacturing industries which clearly provide a picture of the Biblical David and Goliath comparison. While Tanga has the highest rate of 119911.5 million Tshs., Rukwa is at the bottom with only 11.0, showing how uneven the country's industries are distributed in favour of the first group. And finally is the column showing the local government recurrent revenue. In spite of the inclusion of the central government subsidy to that effect, the figures tell how deep the pockets of the residents of the respective regions are. Here the same story is repeated; except for Tabora, the difference between the two groups is obvious, with the former reserve areas being worse off than the other group.

This analysis shows that there are some areas within the country which seem to have been condemned to lesser development on account of, among others, historical and political reasons. Certainly it cannot assist the effective articulation by the ethnic communities of the concerned backward regions, as to their rights to economic self-determination, for the Constitution to forbid them to politically organise themselves along those lines. Outright tribalism and racism may justifiably remain in article 20 of the Constitution as the basis upon which to refuse the registration of political parties practising them. But one does not understand why development problems of particular areas of the Republic should not be dealt

with through the formation of political parties for those purposes, by the people who are ethnically tied thereto.

The same is even more true of the marginalised hunter/gatherer and pastoral communities such as the Tindiga, Dorobo and Barbaig of Northern Tanzania. These communities, have their own peculiar way of life, quite distinct from the domineering majority Bantu speaking people of Tanzania. Thus they have remained out of the modernisation process both culturally and economically. Yet all governments since the colonial days, have always imposed on them the demands of modern political regimes with disastrous effects, as is even admitted by the present government itself.[1] Indeed the government has done little to understand these tribal communities. One can say, the government does not see any benefit out of them apart from subjecting them to continuous anthropological studies, mainly by foreign researchers, looking for simple community case studies to explain current problems of the complex modern societies.[2]

In the case of the Barbaig, in recent years the state has basically uprooted the whole tribal communities from their pastoral lands, alienating the same to a parastatal organisation carrying out some large wheat farming with Canadian aid.[3] Undoubtedly the problems mentioned above do affect these communities in their tribal capacity and not otherwise. The government's attitude of the condemnation of tribes as backward and counter-development is a modernist legacy of colonialism, which cannot have any basis in the political thinking of constitutional makers three decades after independence. For those reasons therefore, the

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1 For example during the Third Sitting of the Seventh Session of the National Assembly on 30 April 1992, while responding to the question from Hon. J. Mulyambatte, MP for Meatu constituency, on the development problems of the Tindiga and Barbaig, Hon. Anna Abdallah, Minister of State in the Prime Minister's and First Vice-President's office admitted as follows: "... efforts of the government to settle and bring social services to Tindiga communities as of now have proved unsuccessful, for it has been found that services which had been rendered did not conform with their customs and norms and thus were unable to solve their problems." See Hansard, 1992:81.

2 Kaare, 1994.

3 See for example the facts in the case of *NAFCO v. Mulbadaw Village Council & Others*, Court of Appeal Civil Appeal No.5 of 1985. Arusha Registry - unreported, whereof the aggrieved villagers got no remedy on account of the employment by the Court of dubious legal technicalities.

tribal restriction in article 20(2) of the Constitution should not be allowed to stand in the way of the desire of members of communities to articulate their problems through the formation of political parties.

As to the avowed commitment to preserve the present Tanzanian Union as is seen in article 20(2), recently the structure of the Union has been the subject of controversy both in political and legal circles, details of which it is not intended here to deal with.[1] Suffice it to say that recent developments in that regard are living illustrations of the undeniable truth that the Union which CCM and its government have vowed to keep sacred and free from political questioning, is not without serious problems. Moreover there is the fact that the said Union was actually the brainchild of the former leaders of the two partners thereto,[2] and was only ratified by the law-making organs in both states,[3] without any wider approval of the people through a referendum. That might have been fine within the context of the post-independence overwhelming mass support TANU enjoyed in Tanganyika, and the revolutionary situation in Zanzibar. But within the present multi-party situation, it should be expected, the existence of a good section of the citizenry who have serious reservations about the structure of the Union, and are desirous of expressing their position through the forum of a political party.[4]

There cannot therefore be any justification, and indeed it amounts to dishonesty on the part of the state to deny, by way of constitutional prohibitions, the right to registration such parties. Indeed it seems that this is the only viable alternative open to the anti-Union

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1 For the detailed analysis of the legal problems of the Union of Tanzania, see Shivji, 1990a.

2 The Union of Tanzania came into existence following the signing of an agreement of understanding officially referred to as the Articles of the union, by the First President of Tanganyika Julius K. Nyerere on one part, and on the other the first President of the Revolutionary Government of Zanzibar, Sheikh Abeid Amani Karume.

3 In the case of Tanzania Mainland, the Union of Tanganyika and Zanzibar Act, 1964, Act No.22 of 1964, Cap.557 of RLT 1965; and in the case of Zanzibar there is only indirect evidence of such ratification by the Revolutionary Council with the Council of Ministers on 15 April 1964. See Shivji, 1990a:4-5.

4 The still fully unregistered but functionally live Democratic Party (DP) led by Rev. Christopher Mtikila has as one of its main policies, the repudiation of the Union and the restoration of the Tanganyika government.

campaigners. The High Court in the case of *Christoper Mtikila v. The Attorney General*[1] has declared the court out of bounds of petitions complaining and seeking redress as to the desirability and form of the Union between Tanganyika and Zanzibar and matters related to what should or should not be included in the list of union matters. According to the judge, that would amount to turning the court of law "into a political battleground."[2] Yet in another case of *Mabere Nyaucho Marando and Another v. The Attorney General,*[3] the High Court took the position we expressed above, with Mackanja J. stating, "If the policy of the incumbent government and that of the ruling party is not for a separate government for Tanganyika, that does not mean that the issue is not legitimate for other political parties"[4]

11.3 The Registration, Co-ordination and Control of Political Parties

While considering the above restrictions and criteria, it is important to take into account the context of the highly curtailed freedom of association by organisations other than political parties under the Societies Ordinance, 1954.[5] Under the present legal arrangement, it is still next to impossible to register a society whose existence and practice does not attract the approval and blessing of the ruling party and government.[6] Registration has to be effected by the Registrar of Societies who is the Principal Secretary of the Ministry of Home Affairs, directly answerable and subordinate to the Minister, the latter necessarily having to endure some allegiance to the ruling party.[7] To make it worse the registration of a society

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1 High Court Civil Case No.5 of 1993, Dodoma Registry -unreported. Hereinafter referred to as the Mtikila case.

2 P.4 of the Ruling on preliminary objections in ibid.

3 High Court Civil Case No.168 of 1993, Dar es Salaam Registry - unreported. Hereinafter referred to as the Marando case.

4 Ibid. 22.

5 Cap. 332 of RLT, 1965.

6 See Peter, 1990: 32.

7 Both are appointees of the President who, even on political grounds only, may dismiss, demote or transfer them at his discretion. The present amendment of the law to prevent senior civil servants to join political parties, does not make any difference if this power of the President remains unchanged, and even with the change of ruling parties under the multi-party system.

may be revoked at any time at the discretion of the President (s.6). Moreover, even business, trade and professional organisations with mandates which seem to go beyond their respective dry business, may also be required by the Minister of Home Affairs to apply for registration (s.6A). This provision was important during the one-party era. It was effectively used to survey and refuse to grant registration to any associations which were seen as political challengers hiding under the guise of other social activities. This is apparently what applied in the rejection of the application of James Mapalala's Civil and Legal Rights Movement in 1991, which though indirectly, was focused to raising the question of the validity of the single-party system itself.[1]

However there was a remarkable shift in the practice under the above Ordinance after the lifting of the ban of opposition parties in 1992. It was now clear that most non-political organisations such as NGOs and other social associations would as a matter of course be granted registration. This led to the proliferation in recent times of such entities all over the country, prompting a call for the establishment of some form of regulatory framework.[2] One may therefore say that for non-political organisations, the situation has in practice improved for the better.[3] But for political parties,[4] the requirements for registration set out by the relevant law over and above the conditions and criteria discussed above, are even more

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1 Not only that, in 1989 an application of the Umoja wa Waganga Tanzania, an intended union of associations of traditional medicine practitioners with branches in all regions of the country, was rejected on the main ground that its constitution provided for national organs which were analogous to those of the ruling party. This author himself took part in the drafting of the said constitution, and assisted in the follow up with the relevant authorities.

2 See FM, 1993:7. Moreover even the politically sensitive Teachers' Trade Union (CHAKIWATA) defiantly choosing to operate without the officially recognised Organisation of Tanzania Trade Unions (OTTU), was ultimately registered in spite of the government's previous reluctance and harassment of its leaders, and the same went on to stage a very successful strike and demonstration, a hitherto unknown scenario in Tanzania. See "EXP, 1993:2.

3 Even for essentially non-political organisations, the government's patience is likely to be easily lost like in the recent case of the de-registration of the Baraza la Wanawake Tanzania (BAWATA)(Tanzania Women Council). See DN, 1997.

4 Which are defined in the Political Parties Act as organised groups, "formed for the purpose of forming a government or local authority within the United Republic through elections or for putting up or supporting candidates to such elections..." See section 2 of the Act.

stringent. The Political Parties Act 1992, like the Societies Ordinance, has also conferred powers of registration of political parties to the Registrar of Political Parties appointed by the President (s.4(1) and (3)). In the performance of his duties the Registrar "shall from time to time consult the Minister" (s.4(4)).

Therefore no organisation may engage in politics in Tanzania without first being registered by the Registrar after tendering the relevant application "in the prescribed manner ..." (s.7(1) and (3)), save for CCM whose registration was expressly assumed by the Act (s.7(2)). The registration process itself is not simple. It must be made in two stages (s.8), with specific conditions imposed for each one of them. First is what is called provisional registration, granted upon fulfilment of the conditions set out in section 9 of the Act (s.7(2)). These are: first, receipt by the Registrar of an application to that effect by the founder members of the applicant party in a prescribed form (s.9(1)(a)), accompanied with a copy of its constitution (s.9(1)(b)). The second requirement is that the membership of the applicant party must be "voluntary and open to all citizens of the United Republic without discrimination on account of gender, religious belief, race, tribe, ethnic origin, profession or occupation" (s.9 (1)(c)). Proof of compliance with this latter requirement depends entirely on the discretion and satisfaction of the Registrar. It is his word, apparently, which is decisive on the matter.

The second stage of registration involves even tougher conditions proof of compliance with which, again, depends on the Registrar's verification. Ironically the Act exempts him from liability for genuine mistakes in the process (s.6). Thus in order to qualify for full registration, the concerned party, having first secured provisional registration, must obtain "...not less than two hundred members who are qualified to be registered as voters for the purposes of parliamentary elections from each of at least ten Regions, of which two Regions are in Tanzania Zanzibar being one region each from Zanzibar and Pemba ..." (s.10(1)(b)).

Undoubtedly this requirement was intended to limit the proliferation of political parties. It involves spending a lot of money to travel about Eight Regions of Tanzania Mainland, not easily undertaken by small and budding organisations which wish to develop into political parties. In the long run this condition invites the domination and control of politics in the country by a small class of wealthy people in a poor country. Although this may not be uncommon in other parts of the world, in Tanzania it is a non-starter in any serious attempt to build real democracy. The other requirements include, the submission by the applicant party of the names of its national leaders, who must come from both Tanzania Mainland and Zanzibar, and the establishment and notification of the address of the national headquarters of the said party (s.10(1)(c) and (d)).

The above conditions being so demanding, it was not surprising that during the early implementation stage thereof, at least two known strong political organisations were negatively affected. The first was the KAMAHURU of Zanzibar led by the popular, charismatic former Chief Minister Seif Shariff Hamad. The other from Tanzania Mainland, was the Democratic Party (DP) of the controversial Reverend Christopher Mtikila. However, whereas the former decided to go round the rules by forging a marriage of convenience with the then mainly mainland party, *Chama cha Wananchi* led by James Mapalala, and formed the Civil United Front (CUF), the DP renounced the Tanzania Union in its policies and has remained adamantly defiant and, consequently, unregistered. But it is still fighting in the courts and elsewhere for the change of the substance of the Constitution. Besides that, thirteen political parties are presently recorded as having attained full registration.[1]

Some of the above-discussed conditions and criteria have already received judicial consideration in the few cases that have followed the practical operation of the new system. In *Christopher Mtikila v. The Attorney General,*[2] one centre of controversy was the amended

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1 See the Certified Extract entitled, "Particulars of Political Parties that Has Obtained Full Registration Under the Political Parties Act 1992 (No.5 of 1992), Office of the Registrar of political Parties, Dar es Salaam, 1995 herein appearing as Appendix IV.

2 Civil Case No.5 of 1993, Dodoma Registry - unreported.

article 20 of the Constitution.[1] In that case, the plaintiff Rev. Christopher Mtikila, being one of the founder members and main ideologue of the Democratic Party, sued the Government in what the judge concluded as a case of public interest litigation.[2] Yet the court, having satisfied itself as to the immutability of the ethic of human rights and thus, the unlimited power of Parliament to amend the provisions of the Bill of Rights, rather surprisingly decided in favour of the validity of the amendments to article 20 discussed above. In the words of the judge, the new article 20(2):

> "...does not abrogate or abridge beyond the purview of article 30(2) of the right of association guaranteed under article 20(1). It merely lays down the conditions a political party has to fulfil before registration and all these conditions are within the parameters of article 30(2). The conditions are clearly aimed at the promotion and enhancement of public safety, public order and national cohesion. There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint, for that would lead to anarchy and disorder. In a young country like ours, nothing could be more suicidal than to license parties based on tribe, race or religion".(p.25)

The judge's extreme positivistic reasoning in this regard was grossly misconceived. As pointed out above in Chapter Nine, the limitation clauses in article 30 of the Constitution are an anomaly in themselves. There can be no justification for making them permanent reference points and standard bearers whenever courts are called upon to decide on the constitutional validity of a law or regulation complained of. This is particularly so in respect of the provisions of the Constitution as was the case in this regard.

Another flaw in the above judge's decision in this respect, is in the way he had generally counterpoised the categories of conditions and criteria in article 20(2) as against the ones he had allegedly derived from article 30(2). These are public safety, public order and

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1 The court in ibid. rightly notes that the right to freedom of association as provided for in sub-article (1) of article 20 of the Constitution remains unchanged after the Eighth Constitutional Amendments although it is insisted that now the right "includes the formation of political parties." The same is said of the former sub-article (2) which is now (4), indicating that the presiding judge in that case did not seem to realise the expansion of the latter sub-article to include a direction that no political party may be refused registration merely on the grounds of her ideology or philosophy.

2 See p.16 of the Ruling on the Preliminary objections in ibid.

national cohesion. One does not see how, for example, the formation of political parties advocating the repudiation of the Tanzanian Union, or for positive discrimination in national development plans in favour of some ethnic communities may *prima facie* prejudice public safety or public order! At worst they can be closely associated with breaching what the judge refers to as national cohesion: unfortunately, he does not seem to realise that breach of national cohesion is not one of the categories enshrined in article 30(2). Therefore the best we can say on this decision is that it was based on the long-established misconceptions on religion, tribe and ethnicity.

Furthermore, although the petitioner was in essence aggrieved by the Registrar's refusal to grant his party full registration, in this particular case he raised a wide range of constitutional issues. These included the constitutionality of the conditions and criteria for the registration of political parties as were enshrined in sections 8, 9 and 10 of the Political Parties Act 1992.[1] It was thus argued on his behalf that the same imposed vague conditions on the formation of political parties, and thereby inhibited the enjoyment of freedom of association as is set out in article 20(1) of the Constitution.[2] Unfortunately the court in this case refrained from making determination of the issues relating to sections 8, 9, 10 and 15 of the Political Parties Act, as the same remained *sub-judice* in the Court of Appeal of Tanzania in another matter involving the same parties, the latter having ended in the plaintiff's disfavour in the High Court.[3] An appropriate opportunity to interpret the law had been lost.

This is because at the subsequent instance of the hearing of the appeal of *Rev. Christopher Mtikila and the Democratic Party v. The Hon. Attorney General and the Registrar of Political Parties,*[4] in the Court of Appeal of Tanzania, the advocate for the Appellants, apparently acting under the pressure of the Court, did drop the grounds of appeal

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1 S.8 provides for conditions congruent to those in art. 20(2) ss.9 and 10 as relating to the powers of the Registrar of political parties in that regard.

2 See pp.17-20 of the judgment, supra.

3 High Court Miscellaneous Civil Cause No.67 of 1993, Dar es Salaam Registry - unreported.

4 Court of Appeal Civil Appeal No.28 of 1995, Dar es Salaam Registry - unreported. Hereinafter referred to as the *Democratic Party* case.

relating to the above provisions. This was due to the fact that the same could not be argued in an appeal which originated from an application for prerogative orders in the High Court, which is now not the correct procedure for challenging the constitutionality of statutory provisions.[1] However the Court went on to decide the matter in the Appellants' favour, holding that the Registrar of Political Parties acted illegally and in contravention of the principles of natural justice, when he refused to grant to the second Appellant full registration without first affording him an opportunity to be heard. And this leads us to the discussion of the incidences relating to the right to freedom of peaceful assembly.

11.4. The Right to Freedom of Peaceful Assembly

In the opening part of this Chapter, it was intimated that the right to freedom of peaceful assembly is closely related to the right to freedom of association. One could just suggest that the former is only a sub-set of the latter, and for that reason it was chosen by the framers of the Bill of Rights to include the two rights in the same article 20(1). Indeed, the right to political association cannot be fully enjoyed in the absence of unhampered freedom of assembly.

In Tanzania, freedom of assembly was curtailed throughout the one-party era with the use of law and government administrative machinery at the grassroots level. At the height of the system, it was the District Commissioner who carried the day.[2] Thus section 40(2) of the Police Force Ordinance[3] granted to these powerful officers of state absolute powers in respect of the issue of permits which, by virtue of sub-section (1) of the same section, were necessary and compulsory for organising any assembly or procession in a public place. The law stated thus:

> "any person who is desirous of convening, collecting, forming or organising any assembly or procession in any public place, shall

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1 Infra Chapter Twelve.

2 See Chapter Five for the discussion of the Colonial District Commissioner's role in native administration.

3 Cap.322 of RLT,1965.

> first make application for a permit in that behalf to the District Commissioner ... and if the District Commissioner is not satisfied, having regard to all circumstances .... he shall, subject to the provisions of sub-section (3), issue a permit ..".

This power had originally vested only in a police officer in-charge of a station during colonialism. The above-quoted section was amended in 1962,[1] to transfer the power to District Commissioners. This illustrated the post-independence regime's resolve to control political activity at grassroots level.[2] The effect of this desire matured and was seen much later with the enunciation of the doctrine of party supremacy. It gave the ruling and only political party, through its stalwarts in government at the district level, exclusive command over political activity at grassroots level.

This arrangement posed no controversy during the three decades of one-party rule. But surprisingly the same was carried over to the *Mageuzi* era by section 11(1) of the Political Parties Act 1992 which read as follows:

> "11(1) Every party which has been provisionally registered shall be entitled -
>
> (a) to hold and address public meetings in any area in the United Republic after obtaining a permit from the District Commissioner of the area concerned for the purposes of publicising their party and soliciting for membership .."

It is this statutory provision which was a major issue in *Mabere Nyaucho Marando and Another v. The Attorney General.*[3] The two plaintiffs, leaders of newly registered political parties, jointly challenged the above-quoted sub-section for offending the Constitution. That it granted District Commissioners who were members and officers of the ruling CCM party, power to grant permits for political rallies, which power had often been deliberately used to

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1 By Act No.35 of 1962.

2 It should be noted that this was in the same package with the provisions of the Area Commissioners Act 1962, Cap.466, and the Regions and Regional Commissioners Act 1962, Cap. 461.

3 High Court Civil Case No.168 of 1993, Dar es Salaam Registry - unreported.

the disadvantage of opposition parties. In effect it was established in evidence that the said government officials holding their positions on account of being active ruling party cadres, gave preferential treatment to CCM and exercised their discretion to the disadvantage of the rest of the parties.

Deliberating on the issue, Mackanja J. emphasised that the power to issue permits was essentially discretionary, which had to be exercised judicially. That required *inter alia*, "...that all get the same and equal treatment. Preferential treatment of one competitor is prejudicial to the others; it is an abuse of that discretion if other parties are discriminated which necessarily results in the infringement of the right of assembly of those who will be discriminated" (p.19).

Following what he referred to as a liberal approach, the judge ultimately held that section 11(1) of the Political Parties Act 1992, offended article 20(1) of the Constitution and could not be saved by article 30(2) thereof (p.23). Thus he insisted that no one could take away the freedoms of association and assembly from any other person. Moreover while adhering to the cannons of statutory interpretation which take into account the actual words used and the circumstances in which they are used,[1] and looking at the Constitution as a living instrument[2] the judge concluded that the question of maintaining public security during political rallies was important, according to him:

> ".. the law requires that political parties organise peaceful assemblies. They have no right, under the Constitution or under legislation, to assemble for an unlawful purpose. And that is why section 11(2) requires security agencies to ensure that there is peace at political rallies. The political parties have no right or freedom to assemble for an unlawful object, that is why they need a permit"[3]
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> ...

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1 Citing *James v. Commonwealth of Australia*, (1936) AC 578, 613, at p.20 of ibid., and *British Coal Corporation.v. The King*, (1935) AC 500, 518, at p.21 of Ibid.

2 Ibid., borrowing from Samatta, J.K., in *Mwalimu Paul Mhozya v. The Attorney General*, High Court Civil Case No.206 of 1993. Dar es Salaam Registry - unreported, at p.2 of the cyclostyled copy of the judgment. Hereinafter referred to as the *Mhozya* case.

3 Ibid.

One sees that the court did not see anything wrong in the requirement for permits as such. What was wrong was the empowerment of District Commissioners to issue the same in order to ensure public security, an object they were not able to fulfil without involving government security agencies (p.23). In attempting to cure that absurdity in the law, the judge ordered the operation of the law to be as it had been enshrined in section 40 of the Police Force Ordinance prior to its amendment by Act No.35 of 1962. This returned the powers to issue permits for public assemblies to the Police.

However a different position was taken by the High Court in another case, decided contemporaneously with the foregoing.[1] In the latter case it was also posed as one of the issues whether sections 40, 41, 42 and 43 of the Police Force Ordinance, and section 11(1) and (2) of the Political Parties Act 1992, which make it necessary to obtain permits in order to hold and organise public meetings and processions were unconstitutional or not. Before endeavouring to answer that issue, Lugakingira J. rightly took time to emphasise the distinction between, on the one hand, the power of District Commissioners to issue permits under section 40(2) of the Police Force Ordinance and section 11(1) of the Political Parties Act, and, on the other hand, the authority of the police to control meetings for purposes of public safety under section 41 of the Ordinance. Noting the fact that the law exempted certain types of public assemblies from the need for permits,[2] the judge insisted that this did not remove the same from police and magisterial supervision in the interest of peace and security.

Then the judge concluded that section 40 of the Police Force Ordinance and section 11(1) of the Political Parties Act 1992, belonged to a class of laws which made the enjoyment of the constitutional right to freedom of peaceful assembly illusory. He found them

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1 The *Christopher Mtikila v The Attorney General* case, op.cit.

2 Giving as examples on p.32 of ibid., religious processions as well as religious social, educational, entertainment and sporting assemblies by virtue of G.N. No.169 of 1958, assemblies convened by rural local authorities within the areas of their jurisdiction by virtue of G.N. No.98 of 1960 and assemblies convened by Municipal and Town Councils within the areas of their jurisdiction.

inconsistent with the express provisions of the Constitution for subjecting the exercise of that right to the permission of another person (p.33). To quote the judge, he stated thus:

> "Both provisions hijack the right to peaceful assembly and procession guaranteed under the Constitution and place it under the personal disposition of the District Commissioner. It is a right which cannot be enjoyed unless the District Commissioner permits."[1]

It was thus held that section 40 of the Police Force Ordinance and section 11(1) of the Political Parties Act 1992 failed to meet the requirements set out in the case of *Kukutia Ole Pumbun and Another v. The Hon. Attorney General and Another*[2], regarding instances when a law derogating from some provision of the Bill of Rights could be saved by section 30(2) of the Constitution. Among such requirements were whether such law was lawful in the sense of not being arbitrary. Also was the requirement whether the same inhered adequate safeguards against arbitrary decision and provided effective controls against abuse of authority. And the judge stated further that:

> "... the requirement for a permit infringes the freedom of peaceful assembly and procession and is therefore unconstitutional. It is not irrelevant to add, either, that in the Tanzanian context this freedom is rendered more illusory by the stark truth that the power to grant permits is vested in cadres of the ruling party".[3]

However it is on the question of the Police control of public meetings and processions that the judge's reasoning and decision is interesting. He did not see anything wrong with section 41 of the Police Force Ordinance for, according to him, it does not take away the right to hold assemblies or processions merely because it empowers the police and the magistracy to step in, "for the preservation of peace and order". (p.34) And, finding support in the cases of *Mohammed Nawaz Sharif v. President of Pakistan,*[4] and *C.R. Ramsan v. Lloyed Barker and the Attorney General,*[5] from Pakinstan and Guyana respectively, the

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1 Ibid.
2 Court of Appeal Civil Appeal No.32 of 1992, Arusha - now reported [1993] 2 L.R.C. 317.
3 *Mtikila* Case: 34
4 PLD 1993 8C 473, at pp.832-833.
5 (1983) 9 CLB 1211.

court held that the granting of the powers of control of public meetings to the police under section 41 of the Police Force Ordinance, met the requirements of the `clear and present danger' test established in the Pakistani case above. On the test the judge stated:

> "As rightly remarked by Mr. Mussa the enjoyment of basic human rights presupposes the existence of law and order. A provision like s.41 is therefore a necessary concomitant to the realisation of these rights. Moreover, there is inherent in the provision a safeguard against arbitrary use. It comes into play when the holding or continuance of an assembly or procession "is imminently likely to cause a breach of the peace, or to prejudice the public safety or the maintenance of public order or to be used for any lawful purpose". (p.34).

Having thus established that the granting of permits and the supervisory aspects of this law were very separate and that on the authority of article 64(5) of the Constitution, they could easily be severed from each other, the court held further, thus:

> ..."the requirement for a permit is unconstitutional and void. I direct the provisions of s.40 of the Police Force Ordinance and s.11(1)(a) of the Political Parties Act and all provisions related thereto and connected therewith, shall henceforth be read as if all reference to a permit were removed. It follows that from this moment it shall be lawful for any person or body to convene, collect, form or organise and address an assembly or procession in any public place without first having to obtain a permit from the District Commissioner. Until the Legislature makes appropriate arrangements for this purpose, it shall be sufficient for a notice of such assembly or procession, to be lodged with the police, being delivered a copy to the District Commissioner for his information." (p.34)

There is no doubt therefore that in both the *Marando* and the *Mtikila* cases, the High Court of Tanzania outlawed the grant of permits for public assemblies by District Commissioners. However, in the former case the court did not completely do away with the permits procedure; in fact it even encroached upon the Legislature by actually "amending" the relevant statutory provision by retransferring the said powers to the Police. But in the latter case, any type of permits for public assembly and procession were declared unnecessary, instead one needed only to notify the police and the District Commissioner.

This seemingly slight difference of judicial opinion from the same court has in practice mattered significantly as far as the government's unaltered desire to control political activity is concerned. In practice, permission from the Police is still a pre-requisite for holding lawful political assembly and/or procession. The position has remained unchanged even after passing, subsequent to the above court decisions, of the Written Laws Miscellaneous (Amendments) Act 1994.[1] In this law section 11 of the Political Parties Act 1992 was amended so as to replace the permits requirement with the new notification requirement. Thus the newly-added s.11(3) of the Political Parties Act 1992 now reads as follows:

> "When a political party is desirous of holding a meeting or procession in any public place in any area it shall, not less than forty eight hours before the meeting, submit a written notification of its impending meeting to the police officer in-charge of the area in which the meeting is to take place is situated".

Furthermore by virtue of sub-section (4) thereof, such written notification has to include:

> "(a) the name of the political party submitting the notification;
> (b) the place and time as to which the meeting is to take place;
> (c) the agenda or purpose in general of the meeting;
> (d) such other particulars as the Minister may from time to time by notice published in the *Gazette* specify."

Undoubtedly the requirement and content of notification as given above is somehow an imposition of pre-conditions for the exercise by political parties of their right to assemble. This view is confirmed by the provision in sub-section 5 thereof indicating that the police officer concerned may direct that the meeting so notified should not be held. And to make it worse, even after complying with the above requirement, the police in-charge of the respective area can prevent the holding of the meeting or procession already notified by the issuance of a stop order. The order can be issued if such officer satisfies himself under sub-

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[1] Act No. 32 of 1994.

section (6) thereof, that the same place is to be used at the same time for a previously notified meeting of another political party, and/or that the meeting so notified is intended to be conducted for unlawful purposes.

One sees that what the Legislature has done is to go further than the substance of the *Marando* case. There is always the probability of extensive misuse and abuse of discretion by the police officers involved. Indeed a series of incidents involving Riot Police (Field Force Unit (F.F.U), invariably applying excessive force to break up rallies and processions, have been recorded.[1] Even at the very zenith of the *Mageuzi* era, the taking place of the first multi-party elections in October 1995, the full enjoyment of free and urestricted freedom of peaceful assembly, was still a dream in Tanzania. This takes us to the next Chapter on the role of courts.

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1 For example in one bloody incident, the long motorcade from the Kilimanjaro International Airport of the populist Chairman of the opposition party NCCR- Mageuzi Augustine Mrema was excessively tear gassed with a lot of casualties, preventing it to enter the Moshi municipality on the only ground that the previously submitted notification to the Police was for the holding of a meeting at some outskirts locality, and not for the procession!

CHAPTER TWELVE

The Courts And The Bill of Rights

12.0 Introduction

Observations noted in Part One of the thesis on international human rights law are equally relevant to domestic protection of human rights. It was shown for example that proclamation of human rights in legal instruments is meaningless without the entrechment of effective enforcement procedures. This Chapter re-assesses the means available for the constitutional enforcement of human rights in Tanzania. Particular attention is directed towards the re-examination of the capacity and ability of the courts, to meet the challenges posed by the human and political discourses in their ongoing transformation. Also institutional limitations faced by the courts in this regard will be discussed. The issue is whether they can be said to be adequately providing effective avenues for the protection, promotion and enforcement of human rights.

The above-stated issues are bound to draw one's interest due to the fact that the Bill of Rights categorically establishes the High Court as the main means by which human rights abuses and breaches may be legally vindicated by the victims thereof. The relevant article 30(3) of the Constitution states:

> "30(3) Where any person alleges that any provision of this Part of this Chapter [The Bill of Rights] or any other law involving a basic right or duty has been, is being or likely to be contravened in relation to him in any part of the United Republic, he may, without prejudice to any other action or remedy lawfully available to him in respect of the same matter, institute proceedings for relief in the High Court."

It has already been clarified by the Court that article 30(3) sufficiently gave the High Court full jurisdiction to hear and determine any complaint against human rights violations

under the Bill of Rights. It was thus considered as one of the preliminary issues in the case of[1] whether the Bill of Rights could be enforced when the procedure and rules of the High Court for conduct of such cases were yet to be enacted by the government as indicated by article 30(4) of the Constitution.

The court answered the question positively, noting that the provisions of article 30 (4) were after all merely optional. Therefore it was held that "by implication the High Court shall have power inherent in itself to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto and certiorari*".[2]

The same position was taken by the judge in another case,[3] which fortunately subsequently gave the opportunity to the Court of Appeal to deliberate on this matter. Thus in the case of D.P.P. v. Pete,[4] the Court of Appeal concurred with the above-discussed position of the High Court, stating:

> "...art.30 sufficiently confers original jurisdiction upon the High Court to certain proceedings in respect of actual or threatened violations of the basic rights and freedoms and duties. We also concur that until Parliament legislates under para (4) the enforcement of the basic rights, freedoms and duties may be effected under the procedure and practice that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought."[5]

Indeed that used to be the position in Tanzania for ten years after the entrenchment of the Bill of Rights in the Constitution, until the coming into force on 17 January 1995, of the Basic Rights and Duties Enforcement Act, 1994.[6] The issue which arises here is whether

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[1] *Chumchua s/o Marwa v. Officer i/c of Musoma Prisons and the A.G. Mwanza* High Court Miscellaneous Criminal Cause No.2 of 1988. Hereinafter referred to as the *Chumchua Marwa* case.

[2] P.4 of the copy of the Judgement in Ibid, relying on the interpretation by an Indian Court of a similar provision and situation in *People's Union for Democratic Rights v. Ministry of Home Affairs. (1986)* L.R.C. (Const.) 546-575.

[3] *Daudi s/o of Pete v. The United Republic of Tanzania*, Criminal Cause No.80 of 1989.

[4] [1991] L.R.C. (Const.) 553 hereinafter referred to as the *Pete* case.

[5] Ibid: 561.

[6] Act No. 33 of 1994.

the High Court must now only follow the procedure and forms provided by this Act when entertaining matters under the Bill of Rights.

On the basis of the ruling of the Court of Appeal in the *Pete* case above, it seems that all cases based on the Bill of Rights will have to be heard and determined by the High Court through the procedure set by the new Act. But the substance and its real objectives leave a lot to be desired. The circumstances under which the piece of legislation came to be conceived by the government are suspect. Moreover its content does not tend to enhance the whole process of human rights promotion in the country. One may even speculate that the Court of Appeal in the *Pete* case, would not have decided in the way it did on this issue, if their Lordships could have possibly foretold that their words would in future be a legitimation of the government's abuse of the Legislature. Let us then first examine how this law came about and then proceed to sort out the substance and implications of its contents.

12.1 The Objectives Of The Basic Rights And Duties Enforcement Act, 1994

First of all it is important to note that this statute was part and parcel of the government's reaction through legislation at the end of 1994, against the High Court's independent and progressive interpretation of the new legal reforms of the *Mageuzi* period. The courts had been seen to be working against any distortion by the executive of the original substance of the Bill of Rights. Thus particularly related to this Act, were the legislative endeavours enshrined in the Eleventh Constitutional Amendment Act 1994 and related legislation. These implicitly had reversed the judicial decisions in *Mabere Nyaucho Marando and Another v. The Attorney General,*[1] and *Christopher Mtikila v. The Attorney General.*[2] This Act was to operate as a permanent solution aimed at the deterrence of unnecessarily excessive judicial activism at the hands of some known judges of the High

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1 High Court Civil Case No.168 of 1993, Dar es Salaam Registry - unreported. Hereinafter referred to as the *Marando* case.

2 High Court Civil Case No. 5 of 1993, Dodoma Registry - unreported. Hereinafter referred to as the *Mtikila* case.

Court.[1] These endeavours are explicit when one takes a close look at the main provisions of this Act, as we do in the next section.

12.2 Power of The High Court

Section 8 of this Act provides for the High Court's jurisdiction in the Bill of Rights cases. Sub-section (1) (a) and (b) of section 8 generally grants to the High Court the jurisdiction to hear and determine any application made on the basis of section 4. However sub-section (2) and (4) of the same section 8 go on to outline some limitations as to the exercise of such jurisdiction. Moreover sub-section (2) further excludes the High Court's exercise of its powers in this regard, in cases where "it is satisfied that adequate means of redress for the alleged contravention are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexations." (s.8(2)) Furthermore the section compels courts to dismiss any application which intends to seek for an injunction against the passing by Parliament of a Bill alleged to contravene the provisions of the Bill of Rights. (s.8(3)) Then the exercise by the High Court of the power to issue prerogative orders is excluded in respect of all applications based on the Bill of Rights. (s.8(4)) The issue is whether the above provisions related to the limitation of the jurisdiction of the High Court, are in the first place constitutional.

The answer to that question has to begin with the holding of the Court of Appeal of Tanzania in the *Pete* case, to the effect that the High Court does have unlimited original

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[1] In particular Justice Mwalusanya a pioneer and creative judge as a number of his judgements on human rights bear witness. According to reliable sources, the early judgements of this judge in the *Chumchua Marwa* and *Pete* cases already discussed in this work, had prompted the anger of the National Executive Committee of the ruling party CCM in one of its regular meetings, which was about to decree for the removal of the Bill of Rights from the Constitution, but for the intervention of the former President and its Chairman Julius K. Nyerere. This is well corroborated by the said party and her government's disrespect and non-recognition of the sanctity of fundamental rights in the Bill of Rights throughout the *Mageuzi* process. The recent request of the Attorney General to the Chief Justice to the effect that Justice Mwalusanya be prevented from hearing and determining the *Mtikila* case was another piece of evidence of the same negative attitude. See Shivji, 1994a: 89.

jurisdiction to adjudicate upon the enforcement of the basic rights, freedoms and duties, only subject to the provisions of article 30(3) and (4) of the Constitution. (p.562) It behoves us at this juncture to test the jurisdictional limitations of the High Court stipulated in section 8 (2) and (3), against the subject matter of article 30 of the Constitution. And let us begin with the limitation in sub-section (2).

The same contravenes article 30(3). It is expressly provided in the latter provision that a person so aggrieved may institute proceedings in the High Court as is required by the article, "without prejudice to any other action or remedy lawfully available to him in respect of the same matter ...". This indeed is just the opposite of what the above section provides, which renders it unconstitutional.[1]

And as to whether an application may be refused by the court only on account of being frivolous or vexatious, it is strange to provide this fact as criterion for the preliminary ouster of some matter from the full consideration of the court. It may be difficult to foresee a situation when an individual will be vexatious of the state. This is an unnecessary introduction into public law of purely private law procedural limitations. Of course for an over-zealous public official prone to the unhampered trespass into personal liberties of individuals allegedly in the public interest, many such complaints would seem frivolous if not vexatious of the government's genuine efforts to work for the good of the people in general! This is the negative culture which section 8(2) of the Act wants to promote, and the Courts are expected to jealously guard themselves against that.

Now coming to sub-section (3), the ban on applications intended to prevent the passing by the National Assembly of a potentially unconstitutional Bill, also offends article 30(3) of the Constitution. The latter allows the exercise of the jurisdiction of the High Court, not only for the actual, but also for an impeded contravention of the Bill of Rights. Indeed

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1 Although the phrase on which the argument relies on is not reflected in the original *Kiswahili* version of the Constitution.

there is nothing in the Constitution which excludes from the genre of breaches, a Bill of the National Assembly proposing for measures which are obviously unconstitutional.[1]

And lastly in respect of sub-section (4), the ouster of the power of the High Court, to issue prerogative orders in this regard, is an encroachment on the independence of the Judiciary. Prerogative orders are part and parcel of the inherent and discretionary powers of the High Court. Briefly stated what the sub-section does, is to attempt to take away through statutory law what the same did not provide in the first place.[2] But of more importance is the fact that by the exclusion of these basically public law remedies,[3] this Act has effectively limited the scope of the courts' powers in this regard.

The same implies restriction of Bill of Rights cases which are in actual fact within the arena of public law, to the realm of private law remedies. Moreover in view of the impact of the Government Proceedings Act 1967,[4] there are serious legal implications involved as is shown below. It should be borne in mind that although the 1967 Act equated in civil proceedings the government to an adult individual of full capacity (s.3(1)), the courts may only issue declaratory orders against the government, and are precluded from making orders against it for injunction and specific performance. (s.11(1))[5] Moreover when it comes to execution, "no execution or attachment or process in the nature thereof" are allowed against the government. (s.15(3)) Therefore in the context of such limited scope of private

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1 This was yet another government reaction against a previous successful pressure of the members of the Media which forced the government to withdraw from the House the Media Council Bill, for none other than a threat of the former to institute proceedings in the High Court praying for an injunction against the passing of the Bill for having provisions likely to contravene the right to freedom of expression under the Bill of Rights.

2 S.17(g) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968, only introduced orders of *mandamus,* prohibition and *certiorari* in substitution of the prerogative writs.

3 In Tanzania the tendency has been to muddle public with private law remedies. See FILMUP, 1994a: 7-12; *Mwakibete v. The Principal Secretary (Establishments) and the A.G.* Court of Appeal Civil Appeal No.27 of 1992 - unreported; *Mazutsi v. The Registrar of Co-operatives*, High Court Misc. Civil Application No.90 of 1992; and *Gordhan v The Director of Immigration*, High Court Misc. Application No. 3 of 1991.

4 Act No. 16 of 1967.

5 For detailed discussion on the Act see Wambali, 1985.

law remedies against the government,[1] the usual defendant in human rights cases, the exclusion of prerogative orders in this regard becomes double jeopardy,[2] which has to be resisted by the courts.

Thus one sees in respect of the limitations comprised in section 8 the government's refusal to obey the Constitution. Actually in a sense it demanded the submission of the Constitution to its will and administrative or political conveniences. Yet there are more serious problems in this Act apart from the foregoing.

In order to take care of the radical and activist judges of the High Court, section 10 of the Act has further provided for the limitations of the Court's jurisdiction. It calls for a specially constituted panel to try human rights cases thus:

> "10.-(1) For the purposes of hearing and determining any petition made under this Act ... the High Court shall be composed of three Judges of the High Court save that the determination whether an application is frivolous, vexatious or otherwise fit for hearing may be made by a single Judge of the High Court.
>
> (2) Subject to subsection (1) every question in a petition before the High Court under this Act shall be determined according to the opinion of the majority of the Judges hearing the petition".

To say the least, Parliament might by the above-quoted provision, have acted within the ambits of article 30(4)(b). However it seems clear that the provision's practical application in the circumstances of Tanzania, will not satisfy the requirements of clause (c) of the same sub-article, that is, "ensuring the more efficient exercise of the powers of the High Court [and] the protection and enforcement of the basic rights, freedoms and duties ...". For a country with a population of over 27 million, to have a High Court for the whole nation manned by less than thirty judges spread in the Court's eleven districts, is not an adequate

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1 See Harlow, 1962 for similar problems in England.

2 It should be noted that neither the Bill of Rights nor the Basic Rights and Duties Enforcement Act have a provision similar to article 46(4) of the Constitution of Malawi which expressly allows the courts in human rights cases to order monetary compensation, for damages suffered by an aggrieved person in consequence of unlawful denial or violation of fundamental rights and freedoms.

number to support the efficient operation of the scheme established by section 10 cited above. In Table 12.1 below it is attempted to illustrate some of the limitations expected.

TABLE 12.1 Disposition Of High court Judges In The Court's District Centres Nation-wide By March 1994

High Court Centre	No. of Regions Represented	Number of Judges
Arusha	1	4
Dar es Salaam	3	7
Dodoma	2	3
Mbeya	2	3
Mtwara	2	2
Mwanza	2	5
Tabora	3	2
Tanga	1	2
Bukoba	1	-
Moshi	1	-
Songea	2	-
TOTAL	20	28

SOURCE: Adapted with some alterations from Table F on page 41 of FILMUP, 1994.

In Table 1 above, column 1 comprises a list of 11 High Court District centres in the whole of Tanzania Mainland. The number of regions each District represents is reflected by the adjacent figure in column 2. In column 3 the number of Judges resident at each Centre is given. The position portrayed remained unchanged by January 1995 when the Basic Rights

and Duties Act came into force.[1] Thus from the Table one sees that for most High Court district centres, it would be a nightmare to convene a three-judges panel to dispose of human rights cases, at the expense of the urgency and sensitivity that this kind of litigation deserves. It would not be any easier even for those centres shown as comprising more than three judges. This is due to the fact that the same, namely, Arusha Dar es Salaam and Mwanza, are the major urban areas with the heaviest workload, particularly as related to criminal appeals and trials of capital offences. The situation is made worse by the fact that according to column 2 of Table 1, 7 out of 11 of the districts, that is 63.6 per cent are made up of more than one administrative region. The administrative district headquarters of the latter must periodically be visited by a judge for court sessions. One therefore sees that the requirement of section 10 of the Act for a three-judge panel mentioned above, is in practice counterproductive. It cannot be said to live to the letter of article 30(4)(c) of the Constitution, for its failure to provide for procedure capable of ensuring the efficient exercise by the court of its powers in the enforcement of human rights.[2] Yet the Act has done worse than that.

This was in respect of section 13(1) and (2) of the Act providing for the nature of the award capable of being granted by the court. The section reads as follows:

> "13.-(10 Subject to this section, in making decisions in any suit, if the High Court comes to the conclusion that the basic rights, freedoms and duties concerned have been unlawfully denied or that grounds exist for their protection by an order, it shall have power to make all such orders as shall be necessary and appropriate to secure the applicant the enjoyment of the basic rights, freedoms and duties conferred or imposed on him under the provisions of section 12 to 29 of the Constitution.
>
> (2) where an application alleges that any law made or action taken by the government or other authority abolishes or abridges

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1 Only that December 1994 witnessed the untimely passing away of the late Justice Mkude, the vacancy later on filled by the appointment of Justice Kaji. Also by the beginning of 1995, the three new Districts mentioned last in the table had been allocated a single judge each, implying a further reduction from the other centres. As this work was being revised by July 1997, the number and distribution of judges remained more or less the same, although some faces had changed.

2 During the past two years Act No.33 of 1994 has been in operation the number of human rights cases heard and decided by the High Court has gone down to almost zero.

the basic rights, freedoms or duties conferred or imposed by section 12 to 29 of the Constitution and the High Court is satisfied that the law or action concerned to the extent of the contravention is invalid or unconstitutional then -

(a) the High Court shall instead of declaring the law or action to be invalid or unconstitutional, have the power and discretion in an appropriate case to allow Parliament or other legislative authority concerned, as the case may be, to correct the defect in the impugned law or action within a specified period, subject to such condition as may be specified by it, and the law or action impugned shall until the correction is made or the expiry of the limit set by the High Court whichever be shorter, be deemed to be valid."

First the above-quoted provisions are contradictory of themselves. Whereas sub-section (1) stipulates for the Court's exercise of the discretion in terms of determining what orders are appropriate and necessary for the applicant's enjoyment of human rights as comprised in the Bill of Rights, sub-section (2) goes on to drastically curtail the same discretion. That although in paragraph (a) of sub-section (2) we see the use of the word 'discretion', the real substance of the provision is to transfer the Court's power to determine the appropriate remedy at the instance of some statute or executive action being held to be invalid and unconstitutional, to the whims of executive power through the instrumentality of Parliament. In any case, one wonders how an invalidity or unconstitutionality may be deemed otherwise under whatever circumstances. Undoubtedly section 13(a) provides for a strange arrangement in constitutional law, although the same is *in pari materia* with article 46(1) of the Constitution of Malawi. But on the basis of where the two provisions appear they have different legal implications. The Malawian provision is part of the Bill of Rights itself.

Therefore section 13 of the Act standing alone, would be inherently problematic. It was thus imperative to simultaneously amend the Bill of Rights [article 30(4)] to accommodate it. The above constitutional provision defines the High Court's original jurisdiction to hear and determine matters brought before it under the authority of sub-article (3). A new sub-article (5) was added to make provisions similar in content to the above-

quoted section 13(2) of the Act. The only difference is the fact that the newly added sub-article (5) of the Constitution sets out the criteria by which the High Court may exercise its discretion whether to allow the government through Parliament to undertake some corrective measures within some specified period of time. The same may only be done if the Court sees it fit and where the interests of society demand so. The provision of the Act just refers to 'appropriate cases'.

However from the wording of both provisions, the High Court still retains some discretion in certain cases which fall outside the ambit of the criteria in the new article 30(5) of the Constitution, to declare as unconstitutional and therefore invalid at the first instance, any piece of legislation or executive action. Yet the main handicap lies with the ambiguity in the set criteria themselves. What amounts to appropriate cases or the demand of the interests of society in real case situations could be an intricate puzzle to resolve.

Considering the circumstances under which these provisions were made by Parliament one may assume that the Courts are expected by the government to regard the interests of society as akin to administrative and political convenience. It is here that the independence and judicial activism of Tanzanian courts will have to be tested in future real case situations. That for the sake of jealously serving the human rights cause, let the Courts make effective use of the residual discretion still availed to them by the new article 30(5) of the Constitution, to declare all statutory provisions and executive action unconstitutional and invalid, at the instance of finding them to be so, and on the spot.

This is also in view of the wider constitutional implications the above provisions may have on among others: "..the relationship between Parliament and the Judiciary based on the underlying principle of the sovereignty of Parliament under the Constitution and separation of powers between the legislature, the executive and the judiciary".[1] The same could imply that the Judiciary is directing the Executive as to the manner of deliberating and

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[1] See TLS 1995. See also MZ, 1995.

proposing laws to Parliament. This involvement of the Judiciary in the direct law-making process, is beyond its traditional and constitutionally recognised mandate. A serious practical constitutional crisis may arise if for example the government refuses to make the proposed amendments, or if it does, Parliament in its sovereignty does not legislate as was originally required by the particular court direction. In the first instance would one say that the government was in contempt of the said court's orders? Or would the Court wish to force Parliament to make the particular law as desired?

Similarly what if all goes well and ultimately Parliament legislates in accordance with the wishes of the Court, it would still be disastrous to the Judiciary's independence, if and when the constitutionality of the same law were to be subsequently challenged in court. Undoubtedly it sounds strange for the same court which proposed the passage of the same law, later to sit and adjudicate upon its constitutionality. Apart from that, this anomaly goes to the roots of the main role of the courts, thus:

> "The judiciary is required by the Constitution to make decisions on matters properly brought before it. The Judiciary cannot postpone making a decision and instead give directives to the offending party to correct its laws or actions. Worse, it certainly cannot allow the offending provision or action which it is satisfied is a nullity to continue. In the eyes of the law, once a law is unconstitutional it simply does not exist."[1]

One cannot therefore understand how a lawyer and let alone a legally trained Attorney General and Minister failed to see the above-described conflict. Yet the fact that the then Minister responsible for legal affairs publicly defended the constitutionality of these provisions, indicates the determination of the government to limit the scope of the enforcement of the Bill of Rights itself. Such a situation requires a highly active Judiciary like that of India which, "since 1973 claims the power to nullify on substantive grounds even an amendment made to the Constitution by the amending body if it changes "the basic structure or framework of the Constitution."[2]

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1 Ibid.
2 Ibid.

Generally speaking, judicial activism is that kind of legal reasoning in the process of adjudication of legal disputes, which makes courts assume some active role in the development of new laws and rules, not otherwise expressly provided by statute. This is in spite of the accepted realism that courts are only meant to dispense justice, and indeed are not law makers. This power has only been assumed by the courts from their constitutional role of dispensing justice independently and without fear.[1] Apart from that it is part of the Constitution's fundamental objectives and directive principles of state policy, "the maintenance of respect and due regard for the dignity and all other rights of men" (art.9(1)(a)) and "the preservation and compliance with the requirements of the laws of the land" (art.9(1)(b)). Thus by ensuring that all organs of state comply with the above principles, courts are bound to get into a supervisory role, in defence of the rights of individual complainants.

In India for example, the same has gone to the extent of the assumption by courts of supremacy and primacy over all organs of state by riding on the back of the doctrine of constitutional supremacy. A former judge of the Supreme Court of India once stated:

> "It is necessary to assess in the clearest terms, particularly in the context of recent history, that the Constitution is *supreme lex,* the paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the constitution or whether its action is within the confines of such power laid down by the Constitution. This court is the ultimate interpreter of the Constitution and to this court is *assigned the delicate task of determining of what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits."*[2]

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1 See Preamble to the Constitution.

2 *State of Rajasthan v. Union of India*, 3 SCC:592-661; AIR, 1977 SC1361-1413.

Therefore the role of activist judicial review is one which the courts in India have over time developed themselves as guardians of the Constitution and defenders of human rights. The issue is whether the Judiciary in Tanzania has something to learn from its Indian counterpart.

12.3 The Nature And Extent Of Judicial Activism Of Tanzania

In Tanzania judicial activism invariably invites some direct conflict between the Judiciary and the Executive, or even the Legislature. The main problem involved is always the complex choice bound to be made between what are political questions exclusively reserved for the other branches of state, and legal matters for the attention of the court, whatever consequences the same may have. The above has already received the attention of Tanzania courts.

Thus in the *Chamchua Marwa* case, Justice Mwalusanya in the High Court had this to say in respect of this complex question, as follows:

> "A great judge is the one who is prepared to shoulder that burden and make decisions as articulate as possible, being a reflection of the conflict before him. It is tempting to seek refuge in such expressions such as 'it is a political question', or that I have to decide 'in public interest', but rationalisations can hardly take one far. Judges should not shamelessly exploit their personal prejudices instead of trying to base their decisions in accordance with their oath of office".[1]

Thus while dismissing what he called the political question doctrine,[2] the judge went on to categorise judicial trends in this regard into two schools, that is the "judicial abstainers" and "judicial activists". The judge pleaded commitment to the judicial activists school which according to him: "... defines political questions principally in terms of the separation of powers as set out in the Constitution itself for the answer to the question when the courts should stand hands-off".

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1 The *Chumchua Marwa case*, op.cit. p.11.

2 Ibid at p. 12, citing Martin, 1970:135, and Henkin, 1976.

The above position for its insistence in being limited to the letter of the Constitution cannot take judicial activism any further in situations of finding solutions to conflicts within the Constitution itself. However the judge became more explicit when he reiterated the above statement in the context of human rights protection under the Bill of Rights, in the subsequent case of *Daudi s/o Pete v. The United Republic of Tanzania*, as follows:

> "It is submitted that with the advent of the Bill of Rights in 1984, the Judiciary in Tanzania and particularly the High Court is blinking under the glare of sustained appraisal of its role in society ... The *Judiciary of late may have been receiving a bad image of a shoddy villain and never the fearless champion of truth and justice* ... If the judges have hitherto taken a restrained approach instead of the activist approach, they should now change. For the judges to be able to capture confidence from the community, a whole new package of legal outlook should be cultivated which does not abandon standards and emphasises judicial creativity with a social objective in mind."[1]

Thus specifically dealing with the issue of the legitimacy of the courts in getting involved with political activism, this judge stated further that:

> "Judges have therefore to be bold spirited. They should not fear making political decisions for law is after all a deeply political matter. Indeed laws are nothing but policies or political will of the ruling class couched in the most general will to impose and declare duties, liabilities, prohibitions and rights of particular groups of people or the general public. Courts and therefore judges for that matter, are in the arena of politics from their inception."

The court above was raising an important issue, that is, the extent to which courts should exercise political neutrality. Unfortunately the Court of Appeal in the same matter on appeal refrained from referring itself to the above reasoning. It only partly confirmed the decision for different reasons.[2]

All the same, it is in the High Court where positions have come up on this matter, which partly decide to the contrary of the above. Thus in the case of *Mwalimu Paul Mhozya*

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1 Supra: 12, relying on the retired Judge of the Supreme Court of the USA Justice William O. Douglas, *The Court Years 1939-1975: The Autobiography of William O. Douglas*, Vintage Book: 1981, pp.55-56, and Mr. Justice Wilson of the Supreme court of Canada, in the case of *Operation Dismantle 1c. The Queen* (1986) L.R.C. (Const.) 421, 440. Added emphasis.

2 *DPP v. Pete*, [1991] L.R.C. (Const) 553, 572.

v. The Attorney General,[1] the plaintiff sought for an interlocutory injunction restraining the former President of the United Republic of Tanzania, Ali Hassan Mwinyi, from discharging presidential functions, pending the determination of the main case. The application involved prayers for the court's order to the effect that the President was guilty of a constitutional offence, for having allowed the violation of the Constitution, following the unilateral joining as a sovereign state of the Revolutionary Government of Zanzibar, to the organization of Islamic States Conference (OIC); and that his continued presence would be unconstitutional and potentially dangerous to the well being of the United Republic and its citizens.

Thus as a result of a preliminary objection at the instance of the Attorney General, Samatta J.K. (as he then was), dismissed that application for absence of the court's jurisdiction to entertain such matter under the Constitution. Basing his reasoning on the availability of the constitutional procedure for the impeachment of the President he held that:

> "If Parliament had intended this court to exercise concurrent jurisdiction in dealing with *politico-constitutional offences* it could easily have said so when enacting s.46A of the Constitution. The omission to provide such a provision in the Constitution would appear to strongly suggest that Parliament did not want judicial process to be used in removing or suspending the President from office. *It is not for this court to say whether this was a wise decision."*[2]

Similar positions were taken by the court in the *Marando and Mtikila* cases. For example Justice Mackanja in the Marando case refused to question the validity of the Constitution which as he put it, he had sworn to "defend without fear or favour", when he had been called upon to declare that the present Constitution should be totally overhauled to cater for the new multi-party era. The court impressed upon the plaintiffs that questioning the validity of the Constitution was a political matter to be resolved exclusively by the political organs of state.

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1 High Court Civil Case No.206 of 1993, Dar es Salaam Registry - unreported ... Hereinafter referred to as the *Mhozya* case.

2 *Mhozya* case: 9. Added emphasis.

The same was underscored by justice Lugakingira in the *Mtikila* case, when he struck out from the Plaintiff's Petition, among others, a paragraph calling for the court's declaration that there was need for the formation of the transitional government, describing the prayer as "political bickering - turning a court of law into a political battleground." According to this judge:

> "not infrequently, therefore, courts will interfere in executive action or inaction to protect and promote the rights of the individual citizen; they will also intervene for similar purposes in legislative action. In doing so they will not be interfering in the lawful policy but for the purpose of ensuring the rule of law. Beyond that they cannot go. They cannot formulate government policy, for that is a political matter, nor will they compel legislation for that is a legislative matter".[1]

It is therefore clear, that there are two positions in the High Court of Tanzania, in respect of the role of courts in political litigation. The minority view is held by Justice Mwalusanya who not only calls for the courts' independent and fearless determination of political disputes, but also does not see anything wrong with courts' direct participation in the political process. According to him the justification lies in the fact that the judicial process itself is essentially political. In the majority are *Jaji Kiongozi* Samatta, Justice Mackanja and Justice Lugakingira. The latter do not dispute that the judges should be bold and fearless defenders of the Constitution in all cases including political disputes, but they advocate limitations as to the exercise of judicial discretion in this regard, to exclude therefrom, disputes which are of outright political nature. Thus the question of courts directly participating in the political process *a la* Mwalusanya, is out of question.

The Court of Appeal of Tanzania has not been able to deal with this matter directly. However we have on record relevant statements made by Chief Justice Nyalali out of Court.[2]

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1 *Rev Christopher Mtikila v. The Attorney General* (*Mtikila* case), High Court Civil Case No. 5 of 1993, Dodoma Registry - unreported, pp.3-5 of the Ruling on the Preliminary Objections.

2 Speech of Hon. Mr. Justice Francis Nyalali, Chief Justice of Tanzania, at the occasion of the Admission Ceremony of Advocates of the High Court of Tanzania on 15 December 1994 - mimeo.

speaking on the above-discussed anomalies in the eleventh Constitutional Amendments, and referring to them as "certain retrogressive steps which have taken place recently in the political field and which concern the constitutional role of the judiciary in our country", he stated thus:

> "..these ... are indicative of a failure to appreciate and accept the real nature and scope of the constitutional changes that have taken place in this country during the last few years. There is a regrettable failure to realise that just as Parliament has been empowered by these momentous changes to impeach the President, confirm the appointment of a new Prime Minister and remove him or her from office on a vote of no confidence for the good of the people of this country, so has the Judiciary been empowered by these changes to enforce human Rights and nullify unconstitutional laws for the good of the people of this country."[1]

Then the Chief Justice went on to provide what may be taken as an effective solution to the existing conflicts within the Constitution and other laws. He sees the same in the prioritisation of what he refers to as the principal goals or objectives of the nation, as are embodied in the various provisions of the same Constitution, the Articles of the Union between Tanganyika and Zanzibar of 1964 and other statues. Thus the Chief Justice saw it as the "sacred duty of the Judiciary and the legal profession to the people of this country", to articulate and disseminate the established national principles and objectives which underlie the Constitution and other laws.

One sees that the Head of the Judiciary in Tanzania, was advocating the extension of the boundaries of judicial activism beyond the ordinary legal parameters, unlike the positivist outlook of a section of the High Court discussed above. That although he did not go as far as Justice Mwalusanya, the overall implications of his thesis about the prioritisation of the principles and objectives, is indeed allowing the court to get if necessary into political considerations, in order to salvage the guaranteed rights of the citizenry. This is indeed a departure from what Bell calls "*passive* political neutrality" which renders the court in political disputes only to behave as a "conduit-pipe for changes in political values between

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[1] Ibid.

political masters and citizens".[1] Instead judicial officials are urged to espouse the ideal of *active* political neutrality, which among others, "...involves taking responsible decisions, exercising discretion, and making value-judgements which are the product of the creative use of skills by the officials."[2]

There is no doubt that in the practice of active political neutrality, the judge is not very divorced from any government bureaucrat, as both are state officials with a general commitment to a particular role", which requires them to be "dedicated to certain values associated with their role, both in its professional character and its social function".[3] But does that reduce the judge's role to a mere bureaucratic process? Certainly judges believe in and operate in accordance with certain principles such as the rule of law, judicial independence, human rights protection etc. which as Chief Justice Nyalali stated are among the well-guarded national principles and objectives. But the issue which arises is whether the judges are part of the main actors in the formation of such principles and objectives. John Bell does not see sense in the Weberian Modernist thinking which sees judges just like any other bureaucrat, as implementer of a pre-meditated and well-set regime of rules and procedures tailored and made by politicians. According to him, although both the roles of judges and bureaucrats are not free from the political process: "The institutional independence enjoyed by judges enables them to promote values which it is their special task to refine and balance against other objectives. *This task is marked more by its independence from the political process than its lack of political content".*[4]

The above analysis may assist us to compromise the above-mentioned two positions of the High Court on the issue of political neutrality. That the ideal position is not for the courts to completely frown from all litigation comprising some absolutely political prayers. The issue is how far they can go into the political province to contradict the main actors in

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1 Bell, 1987:53. Emphasis added.
2 Ibid. Emphasis added.
3 Ibid.
4 Ibid. Emphasis added.

the political field. The criteria coined by the Chief Justice above should be adhered to by Tanzanian courts in appropriate cases, in particular in questioning the recent encroachment of the Constitution by the Executive through Parliament as has been amply elucidated above in this Chapter.

Now whether the Judiciary in Tanzania is sufficiently active is another question all together which we briefly consider in the following section. The former Chief Justice of India Justice Bagwati has set the requisite standards of an activist Judiciary in the Third World, thus:

> "The modern judiciary in Third World countries cannot afford to hide behind notions of legal justice and plead incapacity when human rights issues are addressed to it. The judges must boldly and imaginatively resolve human rights issues ... It is to the judiciary that the task is assigned to positivise human rights; to spell out their contours and parameters, to narrow down their limitation and exceptions; and to expand their reach and significance by involving component rights out of them while deciding particular cases".[1]

It has invariably been expressed in academic circles, based on the studies made of human rights decisions in Tanzania prior and after the coming into operation of the Bill of rights, that there is:

> "...a clear division between .. the High Court of Tanzania and the Court of Appeal of Tanzania. Whereas the High Court appears to be active the Court of Appeal crawls about with significant conservatism. The general approach of the Judiciary, however, with very few exceptions, is positivist, interpreting legal provisions literally at times, even where such interpretation is against rules of criminal justice."[2]

It was demonstrated in Chapter Nine how in the interpretation of limitation clauses the High Court and Court of Appeal revealed two trends indicated in the above-quoted statement. But of more significance to our present argument, was the fact that none of the two trends could be said to have departed from the positivist approach. However in the cases recently decided

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1 Bagwati, 1989:81.
2 Bahroon, 1993:114-115.

relating to the right of association, peaceful assembly and public participation,[1] there seems to be some improvement. Not only is there witnessed a more open-handed, liberal and purposeful interpretation, but an imaginative and creative approach. Nevertheless the court's involvement in the political process is yet unsettled. But one now sees the High Court which seems to be independent, fearless and determined to defend the Constitution, even if it means going beyond the boundaries set by the Constitution. This is not to mention the leading role it took in rejecting to apply and thus causing the re-enactment of the law relating to the granting of Bail as had been introduced by the Criminal Procedure Act 1985.[2]

Indeed the High Court has in some instances gone too far in the direction of judicial activism to the dislike of the Court of Appeal, like what happened in the case of *Butambala v. The Attorney General.*[3] The Court of Appeal disapproved the High Court judge's initiation of proceedings leading to invalidation of a statutory provision *suo motto.* It condemned the same as amounting to creating an "ambulance court", stating that " ...knocking down laws or portions of them should be reserved for appropriate and really momentous occasions". Yet the court warned itself against being taken as having established a position which was "conservative in the negative sense" and it emphasised that:

> "We must not be understood to mean that judges should shy away from their function of construing the Constitution which is their proper and legitimate province. But there must be *occasion* for that. That is a *judicial* power reserved for judicial situations. When we are *moved* we move into judicial action and fulfil our responsibilities. Not otherwise. We are not knight errands" (sic).[4]

One sees in the above case that although not directly addressing the question of political neutrality, the Court of Appeal has stood half-way between the two high Court positions discussed above. But conclusively it can be said that in *Butambala* the court has set

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1 See supra, Chapters Ten and Eleven.

2 For the full account on this development, See Bahroon, 1993:115-171. For lack of space this Chapter excludes a detailed discussion of the cases.

3 [1992] LRC. (Const.) 495.

4 Ibid.

out boundaries of judicial activism beyond which lower courts cannot easily venture. In the next section, we move to briefly examine some problems which apart from government interference may also be standing in the way of the efficient performance of the role of the Judiciary as far as human rights enforcement is concerned.

12.4 Obstacles Facing The Courts In The Performance Of Their Role

We mentioned in Chapter Eight the marginalisation of law and legal institutions at the height of the state-party in Tanzania. This involved the institutional decay of the judicial system. The above has in the past invited some soul-searching within the Judiciary department itself, calls for reform being heard from Judges Conferences of 1991 and 1992.[1] Moreover there is the chronic problem of the delays in the disposal of court cases, especially in the High Court. As for the latter, in-house solutions have over time been introduced by the Chief Justice with only minimal improvement.

This concern for the inefficiency of the courts has invariably led to measures adopted for the improvement of discipline amongst judicial officers at all levels.[2] Thus there has been for some time in operation a Code of Conduct for Judicial Officers, and recently the introduction of the Regional and District Judicial Boards to enforce the Code in respect of officers in the respective areas.[3] It should be noted that the above are measures in addition to the traditional role of the Judicial service Commission.[4] And furthermore the same has been of late been legislatively extended to cover members of the Bar, the objections of the later notwithstanding.[5]

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1 Bukurura, 1995:3.

2 Examples include, The Case-flow System (CJ Circular No.1 of 1992); Disposition of Advocates System, whereby Magistrate must report on cases conducted by advocates (CJ Circular No.2 of 1992); and The Individual Calendars For Judges and Magistrates System (CJ Circular Nos.3 of 1973).

3 GN. 510 and GN 511 both of 1991.

4 Under the Judicial Service Act, 1962, Cap.504 of the Revised Laws of Tanzania.

5 Advocates Ordinance (amendment) Act, 1993. For the Tanganyika Law Society 's resistance to these measures see DN, 1993.

The other significant limitation has been the general alienation of the Judiciary from the people it serves, the distance illustrative of the hangovers of the defunct dual court system.[1] And although there were since the 1960s concerted efforts to bridge this gap, the problem is still living with the courts todate, especially when the same is coupled with the general legal illiteracy among the people at all levels. We shall discuss the latter in the next Chapter.

12.5 Towards a Complementary Human Rights Enforcement Organ

There is this idea in-built in legal circles that human rights can only be vindicated in courts of law. The same is said to be grounded in a distorted notion that courts have always been at the Centre of administration of justice, which is not true even in the case of traditionalist England.[2] Thus in the context of the problem-ridden High Court of Tanzania, it certainly is inappropriate to surrender to it all enforcement of the Bill of Rights as the Constitution has done (art.30(3)).

MacAuslan, Meela and Mgullu in another of the FILMUP reports,[3] have rightly challenged the outdated anti-administrative tribunal sentiment shared by many lawyers in Tanzania.[4] Actually administrative tribunals in many other jurisdictions have lived to the advantages justifying their existence, that is, accessibility, cheapness and expertise. There is no doubt that even after the implementation of the FILMUP recommendations, the High Court of Tanzania will still be short of satisfying any of the above elements. Moreover experience at the international plane, has shown the existence of affective human rights enforcement measures apart from adjudication. It is for those reasons that there is cause for the establishment of the Tanzania Human Rights Commission as an enforcement organ

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1 During the colonial period until 1963, there was operative in Tanganika two separate court systems, one for natives and the other for non-natives. Although courts were unified by the Magistrate Courts Act, 1963, the High Court and Resident Magistrates Courts having institutionally stepped in the shoes of the former non-native courts, they remain comparatively distant from the people than the primary courts.

2 Seidman and Seidman, 1994.

3 FILMUP, 1994b.

4 Ibid: 6-7 attacking statement from SCR, 1994; Chapter 20.

alongside the High Court. A similar organ can be found in the Constitution of the Republic of South Africa.

12.6. Legal Sector Reform

The Government has not of recent turned a deaf ear to the problem facing the Courts and the Legal Sector generally. With the current economic reforms ushering in an open and expanded private sector, the importance of an effective legal sector cannot be overstated.

Thus in this regard, on 21 April 1993, the Prime Minister of the United Republic of Tanzania appointed a nine-member Legal Task Force (LTF), "to undertake an in-depth study of the Legal Sector in Tanzania, under the Legal Sector Component of the Financial Institutions and Legal Management Upgrading Project (FILMUP).[1] The LTF was chaired by Mr. Mark Bomani, the former Attorney General of Tanzania.[2]

The particular institutions and aspects of the Legal Sector Studied included: Administration of justice, Quasi-Judicial Institutions and Alternative Dispute Settlement Mechanism; Legal Profession in Tanzania; Legal Aid and Dissemination of Legal Information; Attorney General's Chambers, Tanzania Legal Corporation and other Government Legal Offices, Law Reform Commission of Tanzania and Law Review Commission of Zanzibar; Permanent Commission of Enquiry (Ombudsman); Legal Education Training; Law Libraries; Legal Registries and Legal Data Base and Information Systems.

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1 FILMUP, 1996.

2 The other members include Hon. P. Msekwa, Speaker of the National Assembly, Hon Mr. Justice B. A. Samatta, then Principal Judge of the High Court of Tanzania and now Justice of Appeal in the Court of Appeal of Tanzania, Hon. Mr. Justice R.J.A. Mwaikasu, then chairman of the Law Reform Commission and now Judge in-charge of the Tanga District of the High Court of Tanzania, Mr. F. C. Mrema, the former Deputy Attorney General who was later replaced by Mr. K.S. Massaba the present Deputy Attorney General, Professor J.L. Kanywanyi from the Faculty of Law of the University of Dar es Salaam, Mr. A. Miskry Principal State Attorney, Zanzibar, Mr. E. Kapinga, Advocate from the Tanganyika Law Society and Ms. M.H.C.S. Longway, the Principal Resident Magistrate but now Commissioner for Land, who was the Task Force's Secretary.

In all of the above institutions and aspects, the overall objectives of those studies were to critically examine the existing state of the above institutions and services, to review their effectiveness and to recommend appropriate remedies to address any deficiencies and to strengthen the legal sector generally."[1]

Thus having made use of both local and foreign consultants, the final report was submitted as 25 January 1996. The Task Force make a wide range of specific recommendations relating to among others, availability of resources to take care of the current under-funding of the Judiciary and other institutions within the Legal Sector; conditions of service of judicial and other staff of institutions in the sector; legal education and training; establishment of a viable information base; and institutional and structural reforms touching upon the Judiciary, Administrative Justice, the Ministry of Justice and the Attorney General's Chambers and the establishment of the Commission on Human Rights and Administrative Justice (CHRAJ).

Some specific aspects of these recommendations are invariably referred to in this thesis, but all zero down to one thing. That since independence the legal sector was drastically ignored by the Government with negative consequences on the administration of justice generally. That this trend must be arrested by heavily investing in the legal sector, including increasing substantially emolument of judges, magistrates, State Attorneys and other staff, in order to boost their work morale and contain the exodus of highly-trained personnel from the sector to better pastures in the country and abroad.

The Legal Sector Report[2] discussed above has recommended for the establishment of The Commission on human Rights and Administrative Justice (CHRAJ).[3] It is an entirely new and independent commission which should be established outside the governmental system to perform the following functions, namely:

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1 FILMUP, 1996:3.
2 FILMUP, 1996.
3 Ibid: 21.

" (i) educate the public on the Tanzanian Constitution, human rights and administrative justice;

(ii) promote the protection of human rights and other constitutional rights;

(iii) investigate complaints of violation of constitutional rights, in particular, violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;

(iv) take appropriate action to call for the rectification, reversal, termination or other redress of such violations, through such means as are fair, proper and effective, including instituting proceedings in a competent court for appropriate remedies."[1]

The proposed Commission will not cater for human rights only but also administrative justice in order to replace the PCE whose limitations were discussed above in Chapter Eight.

The Task Force's recommendation for the establishment of the CHRAJ which is institutionally independent of the government structures is definitely a step forward towards the right direction. However it is imperative in order to guarantee such independence, that the Commissioners thereof be appointed by or with the consent of the National Assembly, and that they be accountable thereto. Apart from that let it be specifically pointed out like in the case of the International Human Rights Committee we discussed in Chapter four above, that its commissioners should be appointed from reputed members of the legal profession, who have a positive record in human rights protection. They should serve the Commission for a specified period. And lastly the status of the Commission should be elevated to that of the High Court or the Industrial Court. That it should have some complementary jurisdiction to investigate violations and grant redress, with appeals going to the Court of Appeal of Tanzania.

This institution could be assigned with responsibility of among others, overseeing the general human rights development in the country. It would on a continuous basis be making follow-ups with the government on the shedding off from the statute book, all laws

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1 Ibid.

threatening the subject matter of the Bill of Rights, reporting annually to the National Assembly. Moreover it would *suo motto* contrary to the conduct of courts, investigate any human rights violations, and affording compensation to injured victims. And lastly it would be able to receive and determine with the least of procedural impediments, individual complaints making orders for necessary remedies. It is important that the quasi-judicial powers are vested in it by statute. In which case, at its proceedings parties should be allowed representation by Advocates of the High Court of Tanzania.

This Chapter was concerned with the assessment of the role of the courts as the main enforcers of the Bill of Rights. It has been shown that the courts are presently full of handicaps both at the institutional and professional levels. Amongst the solutions proposed is the establishment of a human rights enforcement organ, complementary to but to work alongside the presently mandated High Court.

Moreover Courts have been urged to embark on an activist and creative interpretation of the law in favour of wider and effective enforcement of human rights within and without the Bill of Rights. It was indeed pointed out that both the High Court and Court of Appeal of Tanzania are still committed to the conservative positivist approach although one notes a lot of improvement.

This may raise a query about the standard used to judge Tanzania Courts in this regard. Specific mention was made of the highly activist Supreme Court of India, and this could imply employing Indian Standards to Tanzania. In the modern human rights discourse this is acceptable.

We noted in Part One the universalisation of human rights and how the globalised norms have influenced the content of the law in Tanzania. It goes without saying that this must attract also the reception of a universalised human rights practice to Tanzania. Actually

that Tanzanian courts often rely on judgments from other jurisdictions especially those of the Commonwealth countries is no secret.[1]

The other reason for insisting on courts being activist or doing what some writers have referred to as "creative use of legal resources",[2] is based on the fact that the Legal System in Tanzania like other countries of the Third World, is not home grown.[3] It "involved as a consequence the introduction of European legal systems through colonial governments, or ...through efforts of "modernising" rulers and the elite to import Western Legal Structures.[4]

In the case of Tanzania and other former colonies the legal profession was introduced and controlled by the government and indeed by the time of independence it was identified with the colonial state.[5] The continuance of this attitude to present Tanzania must be abrogated, if lawyers and the Courts are to be expected to play a leading role in the human rights crusade. Indeed the most appropriate strategy should involve a combination of tactics. That whereas we are called upon to learn from and emulate the other comparatively developed systems such as that of India, we are also bound to carve our own system in accordance with local demands and circumstances. This can only be done by intentionally developing human rights norms and practice both within and without the Constitution which depart from the limited Bill of Rights we discussed in Chapter Nine. It is only an activist Judiciary like that of India which can lead the way towards that direction. This is a lawyer who is not scared of getting into other disciplines political or otherwise, indeed a "development lawyer" *a la* Dias and Paul.[6] The one who does not believe that the lawyer should or could confine himself strictly to legal issues.[7]

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1 Indeed this is the object of the publication of the Commonwealth Law Reports.
2 Dias, and Paul 1991:368.
3 Ghai, 1981a:148.
4 Dias, James and Paul, 1981: 11.
5 Ghai, 1981: 156.
6 Dias and Paul, 1981:15.
7 Ibid: 16.

In the next Chapter the question of legal literacy is addressed as human rights law and its enforcement may remain ineffective in a society which is largely illiterate of the rules and norms provided by the Constitution.

CHAPTER THIRTEEN

Legal Illiteracy And Other Problems of Human Rights Enforcement

13.0 Introduction

The past Chapter dealt with the role and effect of Courts in Tanzania in the enforcement and development of human rights law in Tanzania. Apart from the problems discussed in that Chapter, there is also the problem of lack of knowledge and information about the Bill of Rights.

It is part of the main argument in this thesis that among the main weaknesses of the human rights discourse in Tanzania, is the general illiteracy of the people at all levels, on the substance and procedure of the protected rights. It involves not only lack of very basic information about human rights, but also ignorance of the correct avenues wherein the same may be enforced.

13.1 Test On The Extent of the Basic Legal Knowledge By The Tanzanian General Population

It should be noted that being aware of the fact of legal illiteracy alone is of no significance to the desirable search of appropriate solutions. It is indeed important to find out the extent of such legal illiteracy, particularly in relation to the identification of specific areas of public law which concern the general populace in their day to day contact with the coercive organs of the state. Thus between March and October 1993, a random survey was

conducted to respondents of all walks of life[1] in the City of Dar es Salaam and at the inland towns of Iringa and Singida.

The questionnaire comprised 38 questions tied to about five themes. These included the Constitution and Rights, Role of Courts, the Permanent Commission of Enquiry, the Police, Militia and the *Sungusungu* Traditional Vigilantes and Civil Litigation Against the Government.[2] Table 13.1 below illustrates some of the results of the random survey.

TABLE 13.1 Test On The Extent Of Knowledge by the Tanzanian General Population On The Basic Legal Questions Relating To The Enforcement Of The Bill of Rights Provisions

Question	Dar es Salaam Respondents Total: 100	Iringa Respondents Total: 100	Singida Respondents Total: 100	Grand Total: 300	Percentage
1. On existence of the Constitution	52	54	70	170	58.7
2. On distinction between CCM/Republic Constitution	42	42	46	130	43.3
3. Fact that it is Republic Const. which entrenches Rights	32	36	46	114	38
4. Whether there is right of Appeal from Primary to District Court	88	84	90	262	87.3
5. Whether Govt. can be sued	43	70	61	174	58

SOURCE: Random survey conducted in the City of Dar es Salaam and the Towns of Iringa and Singida in Tanzania Between March and October 1993.

In Table 13.1 above, it has been revealed that there is a generally similar pattern of the level of the responses from respondents from all the three centres, the great distances between them notwithstanding. That can be said to have been influenced by a significant

1 See Appendix Six.
2 See Appendix Five.

presence in the sample of the officially employed respondents forming about 53.3 per cent of the total of 300, with 42 per cent, 41 per cent and 52 per cent for Dar es Salaam, Iringa and Singida respectively. This group being generally literate and more exposed, are expected to be more legally aware than the localised peasant group which in this sample formed only 21.3 per cent. However the same argument can be used to illuminate how worse the situation would have been if such research involved a purely peasant sample, the same forming the majority of the country's population.[1]

Besides that the Table necessarily raises concern that only 58.7 per cent of the random sample knew the existence of the Constitution and what it meant. This is in a country where there is so much talk about universal primary education and almost full adult education. Not only that, but also that only less than a half of them, that is 43.3 per cent, could tell the distinction between the constitution of ruling party CCM and that of the United Republic. To make it worse, even of those who knew of that distinction, there were some who could not tell in which of the two were entrenched the Bill of Rights provisions. Only 38 per cent of the respondents knew that the same were comprised in the latter document, surprisingly Dar es Salaam hitting the lowest 32 per cent.

However this research has also revealed that there is a remarkably high mass awareness of the role of the courts as the avenues for the adjudication of rights. In a question not included in the above table, which was framed to test the respondents' knowledge as to the correct avenue to go for redress in case one falls victim of a human rights violation at the hands of the police, the following were the responses as are summarised in Table 13.2 below.

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1 BOS, 1994: 25 Table C 7.

TABLE 13.2: Level Of Awareness As To The Jurisdiction of Courts To Grant Redress Against Some Specified Human Rights Violation

Suggested Avenues	Dar es Salaam Respondents Total: 100	Iringa Respondents Total: 100	Singida Respondents Total: 100	Grand Total: 300	Percentage
CCM	14	2	8	24	8
Courts of Law	56	76	78	210	70
Not Sure	12	Nil	4	16	5.3
No Reply	4	4	2	10	3.3

SOURCE: As shown in Table 13.1 above.

Undoubtedly what Table 13.2 portrays is a bright situation. The same tallies with the rate relating to question 4 in Table 13.1 above, whereby 87.3 per cent of the respondents knew of the right of appeal from the Primary Court to the District Court. Indeed, for 70 per cent of the respondents to correctly mention courts of law as appropriate authorities in that regard, is a big proportion which can only be explained by the recent mass education and sensitisation efforts by the Judiciary Department through a weekly radio programme. Similar endeavours include those of the University of Dar es Salaam Legal Aid Committee and other Legal Aid Schemes. One has to take note of the effect of the party supremacy doctrine at the height of the state-party to appreciate this development. Indeed the strength of the misinformed belief and trust in the ability of extra-legal institutions then grossly imprinted in the minds of the ordinary people, can still be witnessed in Table 13.1. This is in a significant 8 per cent of respondents thinking that the ruling party CCM was the right place for the adjudication of legal rights. That although in another question not reflected in the above two tables, respondents were evenly divided as to which is the highest appellate court,[1] still this awareness about the courts and their role should be seen as a bright future ahead in the direction towards the successful human rights crusade in Tanzania.

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[1] With only 57.3 per cent correctly mentioning the Court of Appeal, and a significantly high 32.7 per cent saying it was the High Court of Tanzania.

13.2: Some Problems Identified by the FILMUP Reports

Most problems faced by courts in Tanzania have been subject of study by the Financial and Legal Management Upgrading Project (FILMUP). This project is the brain-child of the World Bank, but is also jointly financed by British and Nordic aid. It is clearly spelt out that the main objective of the study is the improvement of the financial and legal sectors to cope with the challenges posed by the re-introduction of the market economy in Tanzania.[1] All of a sudden democracy and good governance have topped the agenda of Tanzania's donor countries and international institutions. It cannot be because of the aid funds they provide to the country, as that has always been the case.[2] What is it then if not that now Tanzania is in the good books of the West after the break up of its traditional Eastern alliance.

One can only say that there is cause for doubting the motive behind the FILMUP initiative. At best it is a further facilitation of the hegemonic relationship Tanzania has always been remotely tied to. For that matter one is not to expect any meaningful solutions for the development of popular democracy and governance at grassroots level, the real problem at the moment. Indeed the preliminary reports[3] already suggest a scheme which only intensifies the clientele of the Tanzanian state to the international financial and therefore socio-legal and political hegemony.

Nevertheless the FILMUP is an important study in the legal history of Tanzania. It has posed many questions which hitherto had been taken for granted. We refer hereto only those aspects which are relevant to this work, in the main from the Report on Legal Education (Twining Report)[4] and that on the Administration of Justice (Bloom Cooper Report).[5]

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1 Bukurura, 1995.
2 Lipumba, 1995.
3 See FILMUP, 1996 for the Final Legal Sector Report.
4 FILMUP, 1994. Also FILMUP, 1996: 131-144.
5 FILMUP, 1994a. Also FILMUP, 1996: 22-78.

The Bloom Cooper report has dealt with a wide range of problems facing courts both at professional and administrative levels. It is interesting that the report touches upon issues such as relating to absence of law reporting in the country for years, under-investment in the legal sector, collapse of the rule of law and inadequate structures of accountability within the court system. Generally the recommendations made do not propose any new regime to be promising, but are a continuation of the old improvement approach started by the Msekwa Commission in 1977.[1] No serious questions were posed as to the adequacy of the present Common law-oriented legal system. One sees nothing in the report on attempts to make the re-confirmed system respond to people's interests at grassroots level.

As for the Twining Report, it is impressive in that it has proposals for the expansion of the Law Faculty of the University of Dar es Salaam, the establishment of a national legal Centre to be named Institute of Legal Education and the need to put in place a standing and systematised post LL.B vocational training to replace the present chaotic legal internship programme.[2] There are also recommendations relating to the teaching of the Certificate and Diploma in Law Courses at the Institute of Development Management (IDM) in Morogoro. The implementation of the above recommendations will definitely deal with the removal of the legal illiteracy handicap mentioned above. In fact what the Twining Report has done is to resurrect the old proposal of the Msekwa Commission for a similar institution.[3] The responsibilities of the said institution which the Twining Report has adopted from the 1977 proposals were as follows:

(a) the practical training of law graduates;

(b) the academic and practical training of prosecutors;

(c) the academic training of magistrates;

(d) the research into the practical aspects of local and judicial administration in Tanzania;

(e) the organisation and supervision of the national legal literacy campaign;

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1 MCR, 1977.
2 FILMUP, 1994.
3 MCR, 1977.

(f) the practical training of court journalists and reporters;

(g) the preparation of journals, law reports, pamphlets, updating Magistrates' Handbook and producing such materials as would be of educational value to wider public; and

(h) arranging for and conducting seminars, long and short courses, and refresher courses, et cetera.[1]

It is clear that an institution with such a comprehensive mandate would well cater for a consolidated crusade against legal illiteracy by co-ordinating, focusing and expanding the various currently operational endeavours under the voluntary legal aid schemes.[2] In this regard also an expanded and adequately funded Faculty of Law would provide a viable supporting role to the proposed institution. Specifically the Faculty's already well grounded and highly trained manpower, could easily operate as transitional avenue for at least the most needed post-LL.B vocational training.

But there is also another basis for an expanded Faculty of law, and it is in respect of undergraduate training. It is regrettable that the Faculty's annual turn-over has constantly remained for three decades at the magic number of 60. This comparing with the Nairobi Faculty's 200 is just too small.[3] One could explain this underdevelopment to the financial dependence of the University on a government which was not keen on the legal sector after all. This has to change within the present demands of the recently revamped private sector, which can be made to contribute towards this desired development. Otherwise this limited supply coupled with the absence of a standing post - LL.B vocational training will continue to be responsible for the comparatively small size of the Bar.[4]

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1 Ibid.

2 For problems and prospects of the existing legal aid schemes see Shivji, 1983.

3 The annual intake for the Nairobi Faculty of Law has risen from 40 in the 1971/72 academic year plus 16 second years who had been transferred from Dar es Salaam to 210 in 1994. Ref. Dean Kibwana interview.

4 By the end of 1994 there were only about 300 enrolled in the Tanzania Roll of Advocates, compared to Kenya's 1400 in full practice by 1994, with a total of 2760 enrolled. Source: Kenya Law Society and Registrar, High Court of Kenya. See also, Bukurura, 1995: 10. Also Rwelamira, 1981: 213.

Yet it is the way practising lawyers are distributed in the country that is more intriguing.[1]

13.3: The Constitution, Democracy And Formal Education

Apart from the above, the introduction of the constitution and democracy components in the syllabi at all levels of formal education, is an important step towards the inculcation of civic responsibility and constitutionalism within society at large. In Tanzania until recently in 1993 when the new syllabus was introduced,[2] there had virtually been no teaching of democracy and the Constitution in all schools. What was taught was political education basically spoon-feeding the ruling party's ideology, to guarantee the people's omnipresent allegiance to the *status quo*.[3] The need for a different type of civic education has been well articulated by two education experts commenting on the above, thus:

> "It is with this background that children will then leave primary school and four years later, be expected to go out and vote for a party of their choice. It is our view that they need an understanding of the real multi-party democracy, and the process that could be followed in our journey towards the ideal. They need to know the "equation" of a multi-party government, to include such issues as being in government and being in opposition (and their role to society while therein), the franchise (right to vote), the meaning of freedom, freedom of speech and of press, and their limits, majority government and coalition government: the use and abuse of power and the rule of law."[4]

This right vision coming from non-lawyer analysts brings hope to the well-wishers of democracy and human rights in Tanzania.

Thus the present primary school syllabus includes:

> "Standard 3: The Founding Principles of Our Nation.
>
> Standard 4: The History of Our Country's independence.

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1 See FILMUP, 1994B: 46, Table 12.3. The Region with the highest number Dar es Salaam, has 86, followed by Arusha, Kilimanjaro, Mwanza, Tanga and Mbeya, with 15, 9, 8 and 7 respectively. There are 5 regions with only one advocate and 4 with none.

2 ICD, 1993.

3 Interview with Mary A. Mkwizu, a long serving graduate Civics teacher at Zanaki Secondary School, Dar es Salaam .

4 Osaki and Wandwi, 1994: 4-5.

Standard 5: The Structure of Government.

Standard 6: The Culture and Way of Life.

Standard 7: The Constitution and Organisation of Our Government."[1]

At that level the syllabus is solid and informative but for one thing. This is the fact that the study of the Constitution has been reserved only for the last year. It would be desirable if it was to be introduced earlier to let children grow with the idea, even during the second year.

On the other hand the Civics secondary school syllabus comprises the following:

"Form I: The Struggles of the Tanzanian From the Colonial to Post-Independence Era.

Form II: The Constitution and Democratic Processes.

Form III: Economic Development in Tanzania.

Form IV: National Culture, Security and Foreign Policy."[2]

It is impressive that the study of the Constitution has been put in the second year, just as children have settled at this level. Yet still it would be more feasible if some aspects of the topic were continued in the third and fourth years to cement the basics established earlier. In the present set up there is a likelihood of forgetting the substance at the end of the fourth year. The situation is made worse by the fact that at the High School level the topic called Politics and Democratic Processes is only one of the seven themes of the two year General Studies subject.[3]

Besides that on reading the content of the courses, the subject covers a wide range of topics which are relevant and informative. The major problem one hears from teachers are their lack of previous training in the relatively new area. They are left to grapple with

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1 Ibid: 3.

2 ICD, 1993.

3 Others being Communication Skills; African Culture and Civilisation; Man, Philosophy and Religion; Science and Technology; Environmental Issues; International and Banking Systems.

whatever they can remember from general knowledge, "without proper guidance."[1] And although the Teachers' Guide directs them to invite expert guest teachers, a study of the scheme of work of the subject at Zanaki Secondary School, Dar es Salaam revealed no such occasion from 1991-1994.[2] This calls for the introduction of teaching programmes for civics teachers, and this is one of the responsibilities which would befit the proposed Institute of Legal Studies.

13.4: Conclusion

This Chapter attempted to examine the problems of legal illiteracy and other institutional handicaps which stand in the way of efficient enforcement and development of human rights law.

The results of the random interviews which were conducted in 1993 at Dar es Salaam, Iringa and Singida generally suggest that knowledge of the Constitution and basic legal procedures is below average in Tanzania. Surprisingly there is sufficient knowledge as to the role of Courts as the right avenues for the adjudication of rights.

As to the institutional problems, comments were made on the FILMUP project whose reports indicate that the government is seriously involved in finding ways of improving the legal sector so that it may be able to cope with the challenges posed by a largely increased private sector and free-market economy.

And lastly it has also been insisted of the need for the introduction of the Constitution and democracy components in the civics syllabi at all levels of formal education. This will cultivate the civic and democratic culture amongst Tanzanian children which is necessary for the growth and development of human rights in the country.

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1 Mkwizu interview; Osaki and Wandwi, 1994: 6-7.

2 Thanks to Ms Mkwizu's courtesy.

CHAPTER FOURTEEN

Conclusion

This thesis has sought to establish the link between the human rights and political discourses in Tanzania. In order to provide the social context of the inquiry it traces the rights struggles of the people of Tanzania from their pre-colonial past identifying the connection between past experiences and future developments. Thus the half-hearted 1984 introduction in the country of the Bill of Rights by the government, is considered to some extent as the achievement and continuation of popular struggles against authoritarian regimes. Undoubtedly the positive law norms enshrined in the Constitution are the preserve of the state. Thus it may seem self-defeatist to assume that the same can be used against the state. The contrary of the above argument has been the point intended to be proved by this study. How rights can be used by progressive forces against the state has been at the heart of this inquiry.

14.1. The Theoretical Argument.

It was intimated in Chapter Two how rights had been used during the European Renaissance by the middle classes as ideological weapons against the feudal state. However it was shown that after the intensification of the bourgeois state the rights struggle lost its revolutionary coloration. Rights assumed some legitimisation role. Although still propagated as

general and universal human standards, at their roots they were bourgeois rights for the enhancement of the interests of the bourgeois state.

However it is elucidated in Chapter One how the above argument had been exploited by the Marxist modernist thinking against the promotion of rights in socialist countries. It was also shown how the same human rights scepticism negatively influenced the promotion of rights in post-independence Africa under the developmentalist paradigm. Nevertheless with time there seems to be agreement that the Marxian argument never vitiated the political role of rights in the context of their legitimation effect in Western societies. As Shivji has put it in Gramscian terms, "political rule by the hegemonic class is predominantly by consensus rather than by coercion".[1] The same was not appreciated in Tanzania early after independence.

It was also noted in Chapter One that the main theoretical problem of this study has been continuity and change in post-independence Africa. The anti-colonial struggles never succeeded to disentangle the continent from the web of imperialism. Instead political independence only tied them to the umbilical cord of the world capitalist system as peripheral and dominated societies. Significantly at the political level, the former nationalist leaders of the popular struggles for independence assumed an new clientele role of a compradorial class. This class it has been said, for its lack of own economic and therefore legitimate base, is "incapable of exercising hegemony in the sense of giving its ideology the character of a common world view shared by subaltern classes as well".[2]

According to Mamdani in these dominated social formations, "state coercion is integral to the reproduction of relations of production".[3] For that reason the African regimes of the neo-colonial state could not strictly adhere to the Western liberal-democratic constitutionalism as

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[1] Shivji, 1992: 44.
[2] Ibid.
[3] Mamdani, 1987.

was discussed in Chapter One. Whether one state formally continued with or repudiated the same was inconsequential, and the generalisation of the African situation in Chapter One was intended to show just that. In both situations independence not long lead to the creation of centralised authoritarian regimes which not only negated democratic institutions at the grassroots level, but also rested state coercion within civil society at all levels.

Tanzania was a classic example of the above at the height of her party-state in the mid 1970s. It was shown in Chapter Eight that the Tanzanian regime was at least honest to itself. It sensed very early after independence that its developmentalist political and economic model was incompatible with the guarantee of human rights in a Bill of Rights. The same was felt of the Westminster constitutional model bequeathed upon them by the British former colonisers. Yet different to other African countries, the Tanzanian state has enjoyed substantial popular legitimacy despite its dominated form. However it was shown in Chapters Six and Seven, the historical roots of the factors which made the country enjoy some common bonds and co-operation against external domination. More emphatically it is shown in Chapter Eight how Julius Nyerere, the leader of the anti-colonial struggles since the early 1950s capitalised on this historical advantage to capture for himself and his party TANU an unrivalled popular base by the time of independence in 1961.

Therefore it was made easier for the newly installed post-independence government in 1962, to openly denounce the Bill of Rights and the Westminster parliamentary democracy. In Tanzania legitimacy was in the trust the people had in the leader and the party. To Nyerere and his company legal legitimacy was secondary. The issue was whether the state in its dominated form, was capable of delivering the goods in terms of meeting the aspirations of the people.

Chapter Eight has demonstrated how the above was answered by the creation of the state-party. The ubiquity of the state in all spheres of life was given some ideological justification in 1967 in

the form of *Ujamaa* socialism in the Arusha Declaration. It has been rightly argued that this provided some form of ideological hegemony not seen even in other African socialist countries like Ethiopia, Somalia, Mozambique, Angola and later Zimbabwe.[1] The question was whether the same would be maintained without resolving the neo-colonial question. Certainly it was not to be.

But the early 1980s marked the beginning of the fall of the state-party. This was marked by the surrender by the state of the little resistance it posed against the direct forces of imperialism. The same was done by knocking at the doors of the IMF and the World Bank and the general economic liberalisation which simply meant the end of the socialist experiment.[2] This in turn had to vitiate the above mentioned ideological hegemony and hence popular legitimacy of the state itself. In this way the re-introduction of some forms of government accountability to the National Assembly and in particular the introduction for the first time of the Bill of Rights, were done in the state's desperation to find some alternative form of political legitimacy. It was indeed a "strategy of absorbing incipient conflict in such a way as to conserve the *status quo*".[3] Yet paradoxically because it remained a compradorial state at the service of imperialism, it would not be capable of "sustaining liberal-bourgeois democracy".[4] Thus what was at issue in this thesis was how progressive forces in Tanzania may turn the above unwilling concession of the state to the advantage of the people's democratic struggles.

Undoubtedly the ideal popular solution against the neo-colonial state is revolution, and the creation of what Shivji calls "a New Democratic Revolution".[5] But the concern of this study has been to articulate how the above may be attained. Relating to the foregoing, is also the

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[1] Shivji, 1992: 44.
[2] For the effects thereof see Stein, 1992.
[3] Cain, 1983: 96.
[4] Ibid: 56.
[5] Shivji, op.cit.

question as to how the present political problems of the people of Tanzania should be addressed. This study subscribes to Campbell`s argument that, "the task of the progressive intellectual is to sharpen the awareness of the producers so that their work does not serve as part of state legitimation and democratisation"[1] This may be translated at the socio-political level by positive endeavours to rid civil society of authoritarianism enjoined thereat by the compradorial neo-colonial state. It does not need a full revolution to do that, yet "the conquest of civil society...is a prerequisite for the final conquest of political society (the state)...."[2]

In Chapter One it was shown that the revolutionary ideals could be achieved gradually at all levels of society, by using whatever is available to spearhead a general counter-hegemonic strategy. As consensus rests at the level of civil society, it "must be won there".[3] Part Three of this thesis attempted to demonstrate how the above could be achieved by way of the maximum enforcement of political rights enshrined in the Bill of Rights.

14.2. What is to Be Done.

In Part Two of this thesis it was shown how the dominant human rights discourse in the form of state law of the major Western countries was promoted to become universally enforceable norms. Moreover attention has been drawn to the effect of the above regime of rights and the international enforcement mechanisms that go with it, has on poor dependent countries like Tanzania. However this thesis looks at this hegemonic relationship as a blessing in disguise to the working peoples of Tanzania suffering under the yoke of the compradorial neo-colonial state. That although the state has been coerced by circumstances into guaranteeing

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[1] Campbell, 1992: 106.
[2] Cain, 1983: 99.
[3] Shivji, 1992: 44.

individual rights in the constitution, the overall effect is that the same have provided yet another battleground among others, for popular political struggles.

Moreover Part Three of this thesis shows how during the recent constitutional reforms between 1992 and 1994, the state demonstrated its true colours characteristics of a dominated formation. Chapter Nine particularly exposed the real features of the Bill of Rights so provided, which are indicative of the hiding of the state behind the concept of community rights. The propagation of "individual versus others or public interest" tug of war and the abundance of derogation clauses in the Bill of Rights, have been preserved to legitimise the continued presence and/or interference of the state in civil society. Human rights are thus given a limited acceptance and qualified application.

Thus in Chapters Ten and Eleven it is shown how through law the above formal limitations have been maintained in practice. In the 1994 constitutional amendments which effected the preservation of state interest over individual rights, it has so unashamedly been demonstrated to the extent of nakedly abridging the constitutional ethos for which the reforms were intended to enhance. Particularly discussed with concern in both chapters were the legislative measures which the government hastily undertook to overrule the High Court`s unpalatable interpretation of the law.

However it has been strongly argued in Chapter Twelve that the way forward is still open. Using the available limited legal framework, the courts can liberate themselves from the cocoon of legalism, to chart out the road towards a progressive view of rights. This is which sees rights as part of a larger political struggle. It is also which sees the rights comprised in the Bill of Rights as only a framework open for further aggrandisement. We have adopted Gramsci`s question "What can law do for us as revolutionary agents?".[1] According to him,

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[1] Gramsci, 1971: 195, as cited in Cain, 1983: 101.

although "norm-creation is legal... but it is not a prerogative of the government". The task of a revolutionary class in civil society should therefore involve "a struggle to achieve authoritative norm creating position". This is because in the Gramscian paradigm, "law has an umbrella effect whereby the standards and ways of thought embedded in it penetrate civil society and become a part of common sense".[1]

Generally speaking the practical argument is that as law was used by the state to deny rights and shrink the arena of democracy, the law can be used the expand them.[2] What is required is the necessary identification of the immediate problem of the people. This thesis considers that the ridding of society of authoritarianism and political repression should be entered at the top of the agenda of progressive forces in Tanzania. Therefore appropriate demands on the basis of the available rights may be put forward to form what Shivji refers to as the new democratic struggle.[3] This should involve in the Gramscian strategy; first creation of active and new traditions in civil society; second, using political society to abet the above task; third, elimination of the distinction between law and morality thus making both civil and political society to function according to the norms of revolutionary classes; and fourth, the gradual diminution of coercion and the creation of "ethical society".[4] The following recommendations invariably made in this work could form the base of such struggle.

14.3. Some Selected Recommendations.

The discussion in Part Three of this thesis unveiled the muddling of the Constitution that have occurred since 1992. This gives cause for substantial reform. The same could be done out of a constitutional conference as is often demanded by the opposition parties but rejected by the

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[1] Cain, ibid: 102, relying on Gramsci, 1971: 265-266.
[2] Seidman and Seidman, 1994.
[3] Shivji, 1992: 57.
[4] See Cain, 1983: 103.

government. But some middle ground could be taken by letting the government to do it through a White Paper following consultation of all interested parties in the making of the original draft of the terms of reference. These should include at least all political parties, the Tanganyika Law Society, all local interested NGOs and civil associations and the Faculty of Law of the national university. The following are some ideas which might be considered. There is need for re-writing the Bill of Rights to avoid the limitations and contradictory provisions thereof which we pointed out in Chapter Nine. The same should be done about the recent amendments we mentioned in Chapter Ten which were introduced by the government to meet some political conveniences, but to the prejudice of human rights. Moreover the exercise of the powers of emergency should never be allowed in ordinary times for any reason whatsoever.

Besides that the scope of the rights to be provided must be expanded to include all economic rights already recognised by international law. In particular freedom of association and the right to work in return of reasonable remuneration, should be defined to include the right to organise and/or form and join trade unions. Furthermore the rights in the new Bill of Rights should be set out in unqualified short statements in the fashion of the relevant Amendments to the Constitution of the United States of America. Similarly the style of the Commonwealth of Britain Bill could be adopted. This has set out a list of rights to be protected in short statements in one of its schedules. This gives space to the interpretation organs to expand their scope in specific contentious cases.

Also Chapter Twelve illustrated the inadequacies of the courts in their capacity as the main avenues for the enforcement of human rights under the Bill of Rights. Thus besides the courts the Human Rights Commission is proposed as a complementary enforcement organ which should be free from judicial constraints. The jurisdiction of the Commission should include

adjudication, promotion and consideration of government reports as to action to be taken in some specific cases of breach or the general promotion of human rights. The same should also be given mandate to co-ordinate nation-wide mass education and sensitisation campaigns in human rights. It should also continuously be in liaison with the ministries responsible for education in respect of devising appropriate syllabi and training of teachers.

In Chapters Seven and Eight it was shown how a regime of laws earlier made to fulfil the colonial mission were carried over and are still in force in the country. It was emphasised that because of their being inherently coercive, the above and similar post-independence pieces of Legislation would stand in the way of the smooth cultivation of the human rights and democratic culture, and thus must be scraped from the statute book. The forty laws listed by Book Three of the Nyalali Commission Report for the same purpose, may only form the base from which to begin the search.

Furthermore Chapter Eight elucidated how the centralised executive presidency which was introduced by the Republican Constitution of 1962, still negatively affects democratic accountability and the promotion of grassroots popular institutions. In Chapter Eleven it was concluded that the constitutional reforms which were effected between 1992 and 1994 have done little to reverse the above position. Therefore in order to promote accountability, it is high time the present executive presidential cum parliamentary system was re-examined. Possibilities could be sought of having the Republic to be headed by a constitutional head of state in a non-executive President. The government to be headed by the Prime Minister should only be collectively accountable to the National Assembly. If it is preferred to maintain the executive President, then he should have only limited powers over government which should not be accountable to him. Particularly he should cease to chair the Cabinet. That should be left to the

Prime Minister. Moreover an independent Civil Service Commission should be re-introduced to operate free of the control of the President and the government. The President's powers of appointment should be transferred to the Prime Minister who should exercise them with the approval of the National Assembly. The Cabinet should be appointed by the Prime Minister but also with the Assembly`s approval.

Besides that the presidential power to assent to the Bills of the National Assembly should be limited to only the exercise of a veto which can be overturned by a two thirds majority of the National Assembly. Then the President must assent and should not be allowed to dissolve Parliament on account of further disagreement. The House`s majority position should in the final analysis prevail over those of the President and Prime Minister.

In addition Central government should be removed from the grassroots level of society apart from departments which should necessarily remain there. The presence of effective local government renders irrelevant the originally colonial District Commissioner's office.

And lastly Chapter Eleven dwelt at length on the undesirability of the existence of unnecessarily stringent pre-conditions for the registration of political parties. Thus although the new constitution should continue to condemn outright practice of tribalism and discrimination on account of religion, ethnicity, race and gender, it should depart from the present set up which regards as *prima facie* sacrilegious political articulation along those lines. In genuinely necessary cases it should be allowed to establish parties advocating for the interests of specific tribal communities, ethnically related neighbourhoods and/or areas, parts of the Union of Tanzania etc. Transparency and unrestricted debate on the real issues grounded in the problems involving the above, will provide permanent solutions and guarantee of the development of democratic culture and civil society.

APPENDIX I

The Bill of Rights of the Constitution of the United Republic of Tanzania

(as amended by Act No. 4 of 1992 and Act No. 34 of 1994)

PART III

BASIC RIGHTS AND DUTIES

The Right to Equality

12.- (1) All men are born free, and are all equal.

(2) Every person is entitled to recognition and respect for his dignity.

13.- (1) All persons are equal before the law and are entitled, without any discrimination, to equal opportunity before the protection of the law.

(2) Subject to the Constitution, no legislative authority in the United Republic shall make any provision in any law that is discriminatory either of itself or in its effect.

(3) The civil rights, obligations and interests of every person and of the society shall be protected and determined by competent courts of law and other state agencies established in that behalf by or under the law.

(4) No person shall be treated in a discriminatory manner by any person acting by virtue of any law in the discharge of the functions of any state office. (Amended by s.8 of Act No.4 of 1992).

(5) For the purposes of this section the expression "discrimination" means affording different treatment to different persons attributable only mainly to their respective descriptions by race, place of origin, political opinions, colour, occupation or creed whereby persons of such description are subjected to disabilities or restrictions to which persons of

another such description are not made subject or are accorded privileges or advantages which are accorded to persons of another such description.

(6) For the purposes of ensuring equality before the law, the state shall make provisions:-

(a) that every person shall, when his rights and obligations are being determined, be entitled to a fair hearing by the court of law or other body concerned and guaranteed the right of appeal or to another legal remedy against the decisions of courts of law and other bodies which decide on his rights or interests founded on statutory provisions;

(b) every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty;

(c) no person shall be punished for any act which before the commission was not defined as such offence, and no penalty imposed for any criminal offence shall be heavier than the penalty in force at the time the offence was committed;

(d) every person is entitled to respect for the dignity of his personal liberty and he shall not be deprived of such liberty save in accordance with the procedure permitted by law in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;

(e) no person shall be subjected to torture or to inhuman or degrading treatment.

The Right to Life

14.- Every person has a right to live and subject to law, to protection of his life by the society.

15.- (1) Man's freedom is inviolable and every person is entitled to his personal freedom.

(2) For the purposes of protecting the right to personal freedom, no person shall be subject to arrest, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases:-

(a) in certain circumstances, and subject to procedure, prescribed by law; or

(b) in the execution of the sentence or order of a court in respect of a criminal offence of which he has been convicted or upon reasonable suspicion or his having committed a criminal offence.

16.- (1) The human person and the dwelling of each person are inviolable and for that purpose every person is entitled to respect to his person, his private and family life, his home and his private correspondence.

(2) For the purposes of affording protection to the right to privacy and personal security in accordance with this section, the state shall make provisions imposing limitations to that protection, being limitation designed to ensure that the enjoyment of such rights and security by any individual shall not be prejudicial to the provisions of this section.

17.- (1) Every citizen of the United Republic is entitled to freedom of movement and residence, that is to say, the right to move freely within the United Republic and to reside in any part of it, to leave and to enter into it, and immunity from expulsion from the United Republic.

(2) Any lawful act or law made for the purposes of:-

(a) imposing reasonable restrictions on the exercise of freedom of movement, and to subject him to restriction or arrest; or

(b) imposing restriction on the exercise of movement so as to -

(i) execute sentence or court order; or

(ii) to secure the fulfilment of any obligation imposed by law on that person; or

(iii) to protect the interests of the public in general or any specific public interest of a category of the public, such act or law shall not be or be deemed to be invalid or inconsistent with this section.

The Right of Freedom of Conscience

18.- (1) Subject to the laws of the land, every person is entitled to freedom of opinion and expression that is to say, the right to freely hold and express opinions and seek, receive and impart information and ideas through any media and regardless of frontiers, and freedom from interference with his correspondence.

(2) Every citizen has the right to be kept informed of developments in the country and in the world which are of concern for the people and their work and of questions concerning the community.

19.- (1) Every person is entitled to freedom of thought, conscience and option in matters of religion, including the freedom to change his religion or conscience. (Amended by s.9 of Act No.4 of 1992)

(2) subject to the relevant laws of the United Republic, the profession, practice, worship and propagation of religion shall be free and a private affair of individuals, and the conduct and management of religious communities shall not be part of the functions of the state.

(3) Reference in this section to "religion" shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly.

20.- (1) Subject to the laws of the land, every person is entitled to freedom of peaceful assembly, association and public expression, that is to say, the right to assemble freely and peacefully, to associate with other persons and, in particular to form or belong to

organisations or associations formed for the purposes of protecting or furthering his or any other interests.

(2) Without prejudice to sub-article (1) no political organ shall qualify for registration if by its constitution or policy -

(a) it aims to advocate or further the interests of -

(i) any religious belief or group;

(ii) any tribal, ethnic or racial group; or

(iii) only a specific area within any part of the United Republic;

(b) it advocates the breaking up of the union constituting the United Republic;

(c) it accepts or advocates the use of force or violence as a means of attaining its political objectives;

(d) it advocates or aims to carry on its political activities exclusively in one part of the United Republic; or

(e) it does not allow periodic and democratic elections of its leadership,

(replacement by s.10 of Act No.4 of 1992) - author's translation from original *Kiswahili* version).

(3) Parliament may enact a law providing for conditions to ensure that political parties adhere to the limitations and criteria set out in sub-article (2) of this Article on the right and freedom of association and peaceful assembly (Added by s.10 of Act No.4 of 1992 - author's translation from original *Kiswahili* version).

(4) Without prejudice to the relevant laws of the land, a person shall not be compelled to belong to any association or corporation, and no party, be it political or otherwise, shall be refused registration only on ideological and philosophical grounds (re-enacted by s.10 of Act No.4 of 1992 - author's translation from original *Kiswahili* version).

21.- (1) Without prejudice to the conditions set out in articles 5, 39 and 67 of this Constitution and of the laws of the land relating to the conditions for electing and being elected, or appointing and being appointed to take part in matters related to the governance of every citizen of the United Republic is entitled to take part in the government of the country either directly or through freely chosen representatives, in accordance with the procedure provided by or under the law. (replacement by s.4 of Act No. 3 of 1994 - author's translation from original *Kiswahili* version).

(2) Every citizen is entitled and shall be free to participate in full in the making of decisions on matters which affect him, his livelihood or the nation.

The Right to Freedom of Work

22.- (1) Every person has the right to work.

(2) Every person shall be entitled to access on equal terms to every office and every function under the state.

23.- (1) Every person, without discrimination, has the right to equal pay for equal work and, accordingly all citizens working according to their ability shall be entitled to receive remuneration according to the quality of the work done.

(2) Every person who works is entitled to just and favourable remuneration.

24.- (1) Subject to the relevant law of the land, every person has the right to own or hold any property lawfully acquired.

(2) Subject to the provisions of sub-section (1), a person shall not be arbitrarily deprived of his property for the purpose of acquisition or any other purpose without the authority of law which shall set out conditions for fair and adequate compensation.

25.- (1) Labour alone creates the material wealth of human society, and is the source of well-being of the people and the measure of human dignity. Accordingly every person is obliged -

(a) to voluntarily and honestly participate in lawful and productive work; and

(b) to observe work, discipline and strive to attain the individual and goup production targets desired or set by law.

(2) Notwithstanding the provisions of sub-section (1), there shall be no forced labour in the United Republic.

(3) For the purposes of this section, and in the Constitution generally, no work shall be deemed to be forced labour, compulsory labour or inhuman service, if that work, subject to any law is -

(a) any labour to be undertaken in consequence of a sentence or order of the court;

(b) any labour required of members of a disciplined force in pursuance of their duties as such;

(c) any labour required of any person which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the society;

(d) labour or service which forms part of -

(i) normal social service or other civic obligations for the well-being of society;

(ii) compulsory national service provided for by law;

(iii) the national endeavour at the mobilisation of human resources for the enhancement of the national social and economic survival, progress or advancement of national productivity.

26.- (1) Every person is obliged to comply with this Constitution and the laws of the United Republic.

(2) Every person is entitled, subject to the procedure provided by the law, to institute proceedings for the protection of the Constitution and legality.

27.- (1) Every person is obliged to safeguard and protect the natural resources of the United Republic, state property land all property jointly owned by the people, as well as to respect another person's property.

(2) All persons shall be by law required to safeguard state and communal property, to combat all forms of misappropriation and wastage and to run the economy of the nation assiduously, with the attitude of people who are masters of the fate of their own nation.

28.- (1) Every citizen of the United Republic has the inalienable and inviolable right and duty to defend, protect and promote the independence and sovereignty, territorial integrity and unity of the nation.

(2) Parliament shall enact appropriate laws to facilitate the service by the people in the disciplined forces and in the defence of the nation.

(3) No person shall have the right to acknowledge or sign an act of capitulation, nor to accept or recognise the occupation or division of the United Republic or any part of its national territory and, subject to this Constitution and any other law, no person shall have the right to prevent citizens of the United Republic from fighting against the enemy who has launched an attach upon the country.

(4) Treason as defined by law shall be the gravest crime against the United Republic.

General Provisions

29.- (1) Every person resident in the United Republic shall be entitled to enjoy the fundamental human rights, and the benefits of the fulfilment by every person of his duty to society, as provided in Articles 12 to 28 of this Part of this Chapter of the Constitution.

(2) Every person resident in the United Republic shall be entitled to be afforded equal protection under the laws of United Republic.

(3) No citizen of the United Republic shall be accorded any rights, privilege or advantage by virtue only of his status, place of origin, occupation or creed.

(4) No law of the state shall confer any right, status, privilege or advantage to any citizen of the United Republic by virtue only of his status, place of origin or descent.

(5) For the purposes of the better enjoyment by all persons of the rights and freedoms specified in this Constitution, every person shall conduct himself and his affairs as not to prejudice the rights and freedoms of others or the public interest.

30.- (1) The human rights and freedoms the principles of which are set out in this Constitution shall not be exercised by any person in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest.

(2) It is hereby declared that no provision contained in this Part of the Constitution, which stipulates the basic human rights, freedoms and duties, do not invalidate any existing Legislation for the purposes of:-

(a) ensuring the rights and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;

(b) ensuring the interests of defence, public safety, public morality, public health, rural and urban development planning, the development and utilization of mineral resources or the development utilisation of any other property in such manner as to promote the public benefit;

(c) ensuring the execution of the judgment or order of the court given or made in any civil or criminal proceedings;

(d) the protection of the reputation, rights and freedoms of others or the private lives of persons involved in any court proceedings,

prohibiting the disclosure of confidential information, or the safeguarding of the dignity, authority and independence of the courts;

(e) imposing restrictions, supervision and control over the establishment, management and operation of societies and private companies in the country; or

(f) enabling any other thing to be done which promotes, enhances or protects the national interest generally.

(3) Where any person alleges that any provision of this Part of this Chapter or any law involving a basic right or duty has been, is being or is likely to be contravened in relation to him in any part of the United Republic, he may, *without prejudice to any other action or remedy lawfully available to him in respect of the same matter,* institute proceedings, for relief in the High Court.[1]

(4) Subject to the other provisions of the Constitution, the High Court shall have and may exercise original jurisdiction to hear and determine any matter brought before it in pursuance of this section; and an Act of Parliament may make provision with respect to -

(a) the procedure regulating the institution of the proceedings under this section;

(b) the powers, practice and procedure of the High Court in relation to the hearing or the proceedings instituted under this section;

(c) ensuring the more efficient exercise of the powers of the High Court, the protection and enforcement of the basic rights, freedoms and duties in accordance with this Constitution.

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1 Underscored phrase not reflected in the controlling *Kiswahili* version of the Constitution.

(d) ensuring the more efficient exercise of the powers of the High Court, the protection and enforcement of the basic rights, freedoms and duties in accordance with this Constitution.

(5) Where an application alleges that any law made or action taken by the government or other authority abolishes or abridges the basic rights, freedoms or duties conferred or imposed by articles 12 to 29 of the Constitution and the High Court is satisfied that the law or action concerned to the extent of the contravention is invalid or unconstitutional then - the High Court shall instead of declaring the law or action to be invalid or unconstitutional, have the power and discretion in an appropriate case to allow Parliament or other legislative authority concerned, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such condition as may be specified by it, and the law or action impugned shall until the correction is made or the expiry of the limit set by the High Court whichever be shorter, be deemed to be valid (Added by s.6 of Act No.34 of 1994 - author's translation).

Extraordinary Powers of State

31.- (1) Notwithstanding the provisions of article 30(2), an Act of Parliament shall not be invalid by the reason only that it provides for the taking, during periods of emergency, or in ordinary times in relation to individuals who are believed to be conducting themselves in a manner that endangers or compromises national security, of measures that derogate from the provisions of articles 14 and 15 of this Constitution.

(2) No measures referred to in subarticle (1) shall be taken in pursuance of any law during any period of emergency, or in ordinary times in relation to any person, save only to the extent to which they are necessary and justifiable for dealing with the situation that exists during the period of emergency or in ordinary times dealing with the situation created by the conduct of the individual in question.

(3) Nothing in this section shall be construed to authorise the deprivation of any person of the right to live except in respect of death caused as a result of war.

(4) In this and the following articles of this Part "period of emergency" means any period during which the proclamation of a state of emergency made by the President in the exercise of the powers conferred on him by article 32, continues in force.

32.- (1) Subject to this Constitution and to an Act of Parliament in that behalf, the President may proclaim the existence of a State of Emergence of the United Republic or in any part of it.

(2) The President may proclaim the existence of the state of emergency only if -

(a) the United Republic is at war; or

(b) the United Republic is in imminent danger of invasion or involvement in state of war; or

(c) there is actual breakdown of Public Order and public safety in the United Republic or in any part of it to such an extent as to require the invocation of extraordinary measures to restore peace and security; or

(d) there is a clear and present danger of an actual breakdown of public order and public safety in the United Republic or any part of it which cannot be avoided except through the invocation of extraordinary authority; or

(e) there is an imminent danger of the occurrence of some disaster or natural calamity threatening the community or a section of the community in the United Republic; and

(f) there is some other kind of public danger which clearly constitutes a threat to the state or its continued existence.

(3) Where a state of emergency is proclaimed in relation to the whole of the United Republic, or to the whole of Mainland Tanzania, Tanzania Zanzibar, the President shall

forthwith transmit copies of the *Gazette* containing the proclamation to the Speaker of the National Assembly who after consulting with the Leader of Government Business in the National Assembly, shall convene a meeting of the National Assembly to consider the situation and determine whether or not to pass a resolution, supported by two thirds of all the members of the National Assembly approving proclamation of the state of emergency issued by the President (Amended by s.11(a) of Act No.4 of 1992).

(4) Parliament may enact legislation making provision regarding situations and procedure whereby certain persons in charge of the functions of Government in specified areas of the United Republic may request the President to exercise powers under this section in relation to any of those areas where there is no existence of any of the situations specified in paragraphs (c), (d) and (e) of subarticle (2) and such situation does not extend beyond the boundaries of such areas; and for providing for the exercise of executive power during the period of emergency.

(5) A proclamation issued by the President under this article shall cease to have effect:-

(a) if it is revoked by the President;

(b) if fourteen days elapse from the date of proclamation without there being passed the resolution stipulated in subsection (3);

(c) after the lapse of a period of six months from the date of the proclamation; save that a meeting of the National Assembly may, before the expiration of the period of six months, extend the period of operation of the proclamation from time to time for further periods of six months by resolution passed by not less than two-thirds of all members of the meeting, (amended by s.11(b)(i) of Act No.4 of 1992).

(d) at any time when the meeting of the National Assembly revokes the proclamation by resolution supported by not less than two-thirds of all the members (amended by s.11(b)(ii) of Act No.4 of 1992).

(6) For the avoidance of doubt in relation to the interpretation or application of this section, it is hereby declared that the provisions of any Act of Parliament and of any other law, dealing with the declaration of a State of Emergency provided for under this section shall apply only to that part of the United Republic where such emergency exists.

APPENDIX II

General Annotation of Laws Affecting Human Rights Enacted

Between 1984 And 1994

1984:

Economic and Organised Crime Control Act 1984, No.13 of 1984

Enhanced freedom of movement and right of fair trial when it replaced the draconian Economic Sabotage (Special Provisions) Act 1983, by providing for the right to bail, and granted original jurisdiction to the High Court in respect of economic and organised crimes, replacing a special tribunal which had been earlier established for the purpose. The amendments were necessary to keep the campaigns in line with the Bill of Rights introduced in the same session of the National Assembly.

Fifth Constitutional Amendment Act 1984, Act No.15 of 1984

It remains the most significant contribution to the human rights cause in Tanzania, for having incorporated for the first time the Bill of Rights in the Constitution.

It also introduced the fundamental Objectives and Directive Principles of State Policy which though unenforceable in courts, were clear constitutional guarantees of the commitment of the state to the principles relating to; democracy and social justice, sovereignty of the peoples, primacy of the welfare of the people, government's accountability to the people, participation of the people in the affairs of their government, maintenance of respect and due regard for the dignity and other rights of man, preservation and compliance of requirements of the laws of the land and compliance with the Universal Declaration of Human Rights.

Moreover it also re-introduced the principle of collective responsibility of the government previously abandoned by the Republican Constitution of 1962 and other subsequent constitutions.

Constitution (Consequential Transitional and Temporary Provisions) Act No.16 of 1984

Negatively affected the whole Bill of Rights by postponing its justiciability for a period of three years to let the government put its house in order, which was not done.

1985:

Preventive Detention (Amendment) Act 1985, Act No.2 of 1985

Partly enhanced the right to liberty and freedom of movement when it rehabilitated the draconian Preventive Detention Act 1962 in response to the Bill of Rights. It curtailed the personal involvement of the President in the exercise of the powers under the Act, by providing for an advisory and follow up organ and allowing the challenging of detention orders in courts of law. But that has not cured the obvious unconstitutionality of the Act, detentions without trial being in contravention of the criminal process allowed by the Bill of Rights.

Criminal Procedure Act 1985, Act No.9 of 1985

Negatively affected freedom of movement by removing the traditional common law safeguards against misuse of the powers relating to criminal cases, investigation, interrogations and prosecutions. In particular it drastically limited the right to bail, though in respect of the latter the courts have made substantial review (see among others Court of Appeal decision in *DPP v. Pete*, [1991] RC (Const) 553)).

1986:

Emergency Powers Act 1986, Act No. 1 of 1986

Procedural law on the exercise of the limitation in article 32 of the operation of articles 14 and 15 of the Constitution. The Act's express extension of the presidential powers of emergency under the Constitution to Regional and District Commissioners unjustifiably increases the risk of these necessary and sensitive powers being abused.

Registration and Identification of Persons Act 1986, Act No.22 of 1986

Restriction of freedom of movement for introducing a citizenry and residence identification procedure akin to that of the defunct pass system of former Apartheid South Africa.

1988:

Parliamentary Immunities, Powers and Privileges Act, 1987, Act No. 3 of 1988

Enhances the right to political participation by confirming the protection of Members of the National Assembly which had always been available but was being subdued by the doctrine of party supremacy. It impliedly creates a breeding ground for the norms of effective representation and freedom of the Legislature from executive interference.

1991:

Deportation Ordinance (Amendment) Act 1991, Act No.3 of 1991

Rehabilitation of the colonial Deportation Ordinance 1921 (Cap 38), by providing for the right of petition to the High Court on the ground of procedural non-compliance, right to make representations to the President to challenge a deportation order after being compulsorily informed of the basis of deportation within 15 days, and for an Advisory Committee. Yet this Act was undesirable for having defeated the object of the Bill of Rights

system, as it followed the order of the High Court to remove the Ordinance from the statute book. (See *Chamchua Marwa v. Officer i/c of Musoma Prison and another*, High Court Miscellaneous Criminal Cause No.2 of 1922, Mwanza Registry - unreported)

Organisation of Tanzania Trade Unions Act 1991, Act No.20 of 1991

Inhibits freedom of association as relating to the right of workers to freely organise. It creates a single national trade union, prohibiting the establishment of rival unions which in any case may find themselves difficult to register under the Societies Ordinance (Cap 337), or otherwise may be outlawed by the President for not following the mainstream organisation.

1992:

The Eighth Constitutional Amendment Act 1991, Act No.4 of 1992

Major amendments positively affecting freedom of association, assembly and political participation, as it re-introduces plural politics. Yet it limits the freedom of political association by its amendment of article 20 of the Constitution to impose conditions which drastically restrict the freedom to form political parties.

It also impairs freedom to stand for public office by the re-enactment of articles 39 and 67 of the Constitution to oust private candidates for the offices of President and Member of Parliament respectively.

Moreover it partly enhances the right to political participation by the re-enactment of articles 74 and 75 of the Constitution to provide for an independent National Electoral Commission at least in theory.

Furthermore it enhances the right to fair trial in election petitions by the re-establishment of the High Court's jurisdiction instead of the former Electoral Commission which at best operated as a kangaroo court.

In the case of the constitution of the National Assembly, it increases its representative content by excluding Nominated and National Members who previously dominated the House, and specifically reserving seats for women Members, a substantial 15 per cent of all the elected Members. (See re-enacted article 66 of the Constitution.)

Political Parties Act 1992, Act No.5 of 1992

Apart from the re-enactment of the provisions of the Eight Constitutional Amendment Act relating to the establishment of political parties, it negates the enjoyment of freedom of political association by subjecting the same to excessive discretion of the Registrar of Political Parties.

Moreover it further restricts the freedom to form political parties by imposing unreasonably stiff pre-conditions, including the prospective parties' commitment to the controversial Tanzania Union.

Elections (Amendment) Act 1992, Act No. 6 of 1992

Provides for an electoral system consonant to the practice of multi-party politics. It also stipulates for the jurisdiction of the High Court in election petitions. It also re-enacts constitutional provisions relating to the National Electoral Commission. However the prominence of executive discretion of the Director of Elections waters down the positive effects of this law on the right to political participation.

Local Authorities (Elections)(Amendment) Act 1992, Act No.7 of 1992

Enhances freedom of association and political participation by instituting the practice of multi-party political activities at grassroots level.

Ninth Constitution Amendment Act 1991, Act No.20 of 1992

Enhances the right to political participation by increasing the power of the National Assembly to include the impeachment of the President. In the same vein it provides for the procedure of vote of no confidence against the Prime Minister and his government. However the same are restricted in effect by the long and cumbersome procedure involved.

Elections (Amendment) (No.2) Act 1992, Act No.21 of 1992

Affects the right to stand for public office by imposing an unreasonably difficult and expensive requirement for a Presidential candidate must be nominated by 200 registered voters from 10 regions out of which 2 must be from Zanzibar one of which must come from Pemba.

Regulation of Land Tenure (Established Villages) Act 1992, Act No.22 of 1992

Encroached upon the right to property by disbanding customary tenure and all associated interests. It also denied the right to a fair trial when it ousted the jurisdiction of the courts in such matters, opting for the outdated and long-crippled Customary Land Tribunals of the 1960s. Moreover it contravened the prohibition against retrospective legislation when it froze all customary claims in land including those which had already been adjudicated upon. Some provisions of the Act have been declared by the Court of Appeal as null and void. (See *Akonaaay and Another v. Attorney General*, [1994]2 LRC 399.)

1994:

Written Laws (Miscellaneous Amendments) Act 1994, Act No.13 of 1994

Came as government reaction against the decisions in *Christopher Mtikila v. The Attorney General* (High Court Civil Case No.5 of 1993, Dodoma Registry- unreported) and *Mabere Nyaucho Marando v. The Attorney General* (High Court Civil Case No.168 of 1993, Dar es Salaam Registry - unreported). Thus it amended the Political Parties Act 1992, by placing the calling and conduct of political public meetings and demonstrations under the exclusive control of the Police instead of District Commissioners. However the notification procedure introduced by the Act leaves too much in the discretion of the officer in charge of a police station without any safeguards against probable incidences of abuse.

Basic Rights and Duties Enforcement Act 1994, Act No.33 of 1994

Another government reaction against the *Mtikila* and *Marando* cases. It limits the scope of the enforcement machinery of the Bill of Rights by requiring for a special panel of the High Court in cases involving basic rights and duties. It further curtails the power of the High Court to provide redress in such cases by outlawing the procedure relating to the power of the court to issue prerogative orders. It also tempers with the principles of separation of powers and the exercise of both judicial and legislative powers, by allowing the courts in cases of finding law or executive action to be unconstitutional, to give the government opportunity to take corrective measures though Parliament or otherwise, instead of declaring the same null and void outright.

Eleventh Constitutional Amendment Act 1994, Act No.34 of 1994

Has negative effects on the right to political participation by the amendment of the Bill of Rights (art.21), to re-affirm the outset of independent candidates, after the same were allowed by the *Mtikila* case (above), thus undesirable for defeating the object of the Bill of

Rights system. It also amends another Bill of Rights provision (art.30) by entrenching in the Constitution the provisions of the Basic Rights and Duties Act 1994 (above) relating to the court orders allowing corrective measures.

APPENDIX III

Tanzania's Ratification Record of the Major International Human Rights Conventions and Protocols As of December 1992

Title of Convention	General Date of Coming into Operation	Whether Ratified by Tanzania
1. Int. Con. on Economic, Social & Cultural Rights	3 January 1976	Yes
2. Int. Con. on Civil & Political Rights	23 March 1976	Yes
3. First Optional Protocol	23 March 1976	No
4. Second Optional Protocol		No
5. Con. on the Prev & Punish. of the Cr. of Gen..	12 January 1951	Yes
6. Con. Rel. to Status of Refugees	22 April 1954	Yes
7. Protocol Rel. to the Status of Refugees	4 October 1967	Yes
8. Con. on the Political Rights of Women	7 July 1954	Yes
9. Con. on the Cons. of Marriage, Minimum Age etc.	9 December 1964	No
10. Int. Con. on the Elim. of All forms of Racial Discrimination	4 July 1969	Yes
11. Con. on the Elim. of All Forms of Disc. Aga. Women	3 September 1981	Yes
12. Int. Con. on the Suppr. of Cr. of Apartheid	18 July 1976	Yes
13. Con. Aga. Torture & Other Cruel & Inhuman etc.	26 June 1987	No
14. Convention on the Right of the Child		Yes
15. Slavery Convention	9 March 1927	Yes
16. Supplementary Con. on the Abolition of Slavery etc.	30 April 1957	Yes
17. Con. on the Suppr. of the Traffic in Persons etc.		No
18. African Charter on the Human & Peoples Rights		Yes
19. Con. Gov. the Spec. Asp. of Refu. Probl. in Africa		Yes

SOURCES: Hamalengwa, 1988: 407-9, Appendix I; Harnum, 1992:280-90; Appendix E; Weston, 1990; and CHRG, 1988.

APPENDIX IV

Certified Extract From the Register of Political Parties: Particulars of Political Parties That Have Obtained Full Registration Under the Political Parties Act, 1992 (No.5 of 1992)

Certificate of Full Registration Number	Name of Party	Principal Bearers	Location and Address of Head Office	Date of Full Registration
001/92	CHAMA CHA MAPINDUZI (CCM)	Chairman: Ali Hassan Mwinyi Secretary General: Lawrence Gama	Kuu Street, Dodoma P.O. Box 50 Dodoma	1/7/1992
002/93	CIVIC UNITED FRONT (CUF) (CHAMA CHA WANANCHI)	Chairman: Musubi Mageni Secretary General: Shaaban K. Mloo	Mtendeni Street Urban District P.O. Box 3637, Zanzibar	21/1/1993
003/93	CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA)	Chairman: Edwin M Mtei Secretary General: Bob Nyanga Makani	Plot No.922/7 Block 86005 Kisutu Street P.O. Box 5330 Dar es Salaam	21/1/1993
004/93	THE UNION FOR MULTI-PARTY DEMOCRACY (UMD) OF TANZANIA	Chairman: Abdullah Said Fundikira Secretary General: Wilson Kamata	Nizar Flats APP 0006 Kisutu Street P.O. Box 2985 Dar es Salaam	21/1/1993
005/93	NATIONAL CONVENTION FOR CONS-TRUCTION AND REFORM (NCCR - MAGEUZI)	Chairman: Augustine Lyatonga Mrema Secretary General: Mabere Nyaucho Marando	6 Shauri Moyo Road P.O. Box 72444, Dar es Salaam	21/1/1993
006/93	NATIONAL LEAGUE FOR DEMOCRACY (NLD)	Chairman: Emmanuel J.E. Makaidi	Sinza D/73 P.O. Box 352 Dar es Salaam	21/1/1993
007/93	TANZANIA PEOPLES PARTY (TPP)	Chairman: Humprey Chem-Mponda Secretary General: Greven Lyimo	Mbezi Juu, Kawe P.O. Box 60847 Kawe, Dar es Salaam	4/2/1993

Certificate of Full Registration Number	Name of Party	Principal Bearers	Location and Address of Head Office	Date of Full Registration
009/93	NATIONAL RECONSTRUCTION ALLIANCE (NRA)	Chairman: Vacant Secretary General: Ulotu Abubakar Ulotu	House No.4 Mvita Street, Jangwani Ward P.O. Box 16542 Dar es Salaam	8/2/1993
010/93	POPULAR NATIONAL PARTY (PONA)	Chairman: Wilfem Mwakitwange Secretary General: Akutu Kinyoka	P.O. Box 71641 Dar es Salaam	5/4/1993
011/93	TANZANIA DEMOCRATIC ALLIANCE (TADEA)	President: Oscar Salathiel Kambona Secretary General: Emmanuel Nyenyema	P.O. Box 33599 Dar es Salaam	5/4/1993
012/93	TANZANIA LABOUR PARTY (TLP)	Chairman: Leo H. Lwekamwa Secretary General: Julius Golugwa	Bungoni Ilala District P.O. Box 7273, Dar es Salaam	24/11/1993
013/94	THE UNITED DEMOCRATIC PARTY (UDP)	Chairman: John Momose Cheyo Secretary General: Richard Kasela Bantu	RUBADA Building Morogoro Road Ubungo Industrial Area Suite 317 P.O. Box 5918 Dar es Salaam	4/3/1994

SOURCE: Office of the Registrar of Political Parties - Tanzania, P.O. Box 63010, Dar es Salaam.

APPENDIX V

QUESTIONNAIRE (Random Interview

I. PARTICULARS OF RESPONDENT

Indicate as appropriate

1. Gender: A. Male B. Female

2. Employment: A. Management B. Ordinary

4. Age: 50 years and above B. 35-50 C. 18-35 D. Below 18

5. Education: A. University or Equiv. B. Post Secondary - Certificate or Diploma.

   C. Secondary Education D. Primary Education E. Adult Education F. Illiterate.

II. ON THE CONSTITUTION AND RIGHTS

6. Are you informed about the Constitution? A. Yes B. No C: Not sure

7. If reply to 6 is A whether there is difference between CCM and United Republic constitutions. A. Yes B. Don't know C. No difference D. No answer.

8. If reply to 7 is A in which of the two are entrenched human rights?

   A. CCM Constitution B. United Republic Constitution C. Don't know D. Not sure E. No answer.

9. If reply to 6 is A, do you think there is adequate protection of human rights?

   A. Very adequate B. Satisfactory C. Inadequate D. Not protected at all

   E. Don't know.

III ON ROLE OF COURTS

10. Appropriate organ to which one may complain on being unlawfully beaten and incarcerated by the Police or People's militia. A. CCM B. Courts C. Don't know D. Not sure E. No answer.

11. What to be done on being dissatisfied with a decision of a Primary court. A. Appeal to the District Court B. Call it quits C. Go to CCM or Minister of Home Affairs.

12. Highest appellate court. A. High Court of Tanzania B. Court of Appeal of Tanzania C. Regional Court D. Don't know E. Not sure.

13. Do you think courts in Tanzania adequately protect people's rights? A. Very adequate protection B. Satisfactory protection C. No protection at all D. Not sure E. Don't know.

14. If reply to 13 is C what are the reasons for omission? A. Laws applicable too colonial and outdated B. Not enough Judges and Magistrates C. Corruption D. Insufficient number of courts E. Case delays F. Other reasons.

15. Ever had a case in court? A. Yes B. No.

16. If reply to 15 is A how long did the case take to finish? A Over 5 years B. 3-5 years C. 1-3 years D. Below 1 year.

ABOUT THE PERMANENT COMMISSION OF ENQUIRY

17. Do you know the duties and mandate of the PCE? A. Yes B. No C. Heard of the Commission but not sure D. Others.

18. If reply to 17 is A ever sent complaint to PCE? A. Yes B. No.

19. If replies for 18 and 19 are A , the time taken to procure final solution. A. Over 5 years B. 3-5 years C. 1-3 years D. Below 1 year.

21. Do you think the PCE adequately protects people's rights?

A. Yes B. No C. Not sure D. Others.

22. If reply to 21 is B what do you think are problems involved. A. Too much bureaucracy B. Delayed reaction by PCE C. PCE's distance from the people D. Not sure E.

Others.

ON THE POLICE, MILITIA AND THE SUNGUSUNGU

TRADITIONAL VIGILANTES

23. Whether the Police adequately protect citizens' security. A. Yes B. No. C. Inadequate D. Not sure E. Others.

24. Whether there is need of having Sungusungu. A. No B. Yes.

25. If reply to 24 is A, what do you think are the problems of the Sungusungu? A. Lack of military training B. Very cruel and inhuman C. Don't care about human rights D. Others.

26. Ever been arrested by the Police on any criminal charge? A. Yes B. No.

27. If the reply to 26 is A were the reasons for arrest explained on the spot? A. Yes B. No.

28. If the reply to 27 is A whether a warrant was issued? A. Yes B. No.

29. If reply to 26 is A, whether excessive force was used. A. Unreasonabe force used B. Reasonable force used in the circumstances C. No force used D. Others.

30. If reply to 26 is A, whether put into custody. A. Yes B. No.

31. If reply to 30 is A, how long you remained in custody before appearing in court? A. More than 2 days B. 1 to 2 days C. Below 24 hours D. Others.

32. If reply to 30 is A, whether you were granted police bail. A. Yes B. No.

33. Ever been summoned by the police as criminal suspect? A. Yes No.

34. If reply to 29 and 33 are A whether and to what extent force was used. An Excessive force used including battery B. Some amount of force used including verbal threats. C. No force used D. Others.

ON CIVIL LITIGATION AGAINST GOVERNMENT

35. Whether you know that the government can be sued in court. A. Yes B. No.

36. Ever sent complaint against government to the Attorney General? A. Yes B. No.

37. If reply to 36 is A time taken to finalise the claim. A. Over 5 years B. 3 to 5 years C 1 to 3 years D. Below 1 year E. No reply at all F. Others.

38. Your opinion on the law which demands ministerial consent to sue the government. A Bad and of no benefit B. Good to protect the public interest C. Not sure D. Don't know E. Others.

END.

APPENDIX VI

Analysis of Information About Random Interview Respondents

Description	Dar es Salaam - out of 100	Iringa - out of 100	Singida - out of 100	Total	Percentage of 300
1. Male Respondents	67	59	48	174	58
2. Female Respondents	33	41	52	126	42
3. Officially Employed	42	62	56	160	53.3
4. Employed in Management	4	12	10	26	16.3
5. Ordinary Workers	38	50	46	134	83.8
6. Peasants	18	12	34	64	21.3
7. Self-Employed	40	12	6	58	19.3
8. Unspecified Employment	-	14	4	18	6
9. Age over 50	10	2	8	20	6.7
10. 30-50 years	20	22	44	86	28.7
11. 18-35 years	62	64	36	162	54
12. Below 18 years	8	-	-	8	2.7
13. No age specified	-	12	12	24	8
14. University or equiv. Education	2	4	6	12	4
15. Post-Seco. Cert/Dip.	3	20	10	33	11
16. Secondary Education	40	28	24	92	30.7
17. Primary Education	48	30	36	114	38
18. Adult Education	5	4	4	13	4.3
19. Illiterate	2	-	16	18	6
20. Education not specified	-	14	4	18	6

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